The

Madras Law Journal

(Reports)

I] JANUARY [1967

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE M. NATESAN.

P. Doraikkannu .. *Petitioner**

v.

The Proprietor, Hotel Savoy, Madras-6 .. *Respondent.*

Payment of Wages Act (IV of 1936), *section* 15 (2)—*Scope—Workman suspended pending enquiry and charges—Payment of wages withheld—Application by worker under section* 15 (2) *claiming wages for the suspended period—Maintainability.*

Section 15 (2) of the Payment of Wages Act would be attracted to all cases where the wages are withheld for some reason or other and is not confined to cases of withholding of wages for the actual work done by the employee.

Where a workman is suspended pending enquiry into charges against him, the non-payment of wages for a number of months on the ground of such suspension would amount to delaying payment of wages within the meaning of section 15 (2) The contract of service subsists between the employer and employee even during the period of suspension and in the absence of a term in the contract or of a rule, statutory or otherwise, or a standing order, permitting the employer to suspend pending enquiry, the employee must be deemed to be in service and entitled to remuneration, the fact that he was not allowed to work not making any difference In such a case, therefore, an application under section 15 (2) of the Payment of Wages Act by the suspended workman claiming wages for the period of his suspension would be maintainable and the Payment of Wages Authority would have jurisdiction to entertain the application and to allow the claim if it is not barred by limitation

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of Small Causes (Chief Judge), Madras, dated 24th August, 1962, and made in P.W. Appeal No. 11 of 1962 (P.W. Case No. 631 of 1961, on the file of the Payment of Wages Authority, Madras).

S. Ramaswami and *I. Doraiswami*, for Petitioner.

A. Abdul Ghani (*amicus curiae*), for Respondent.

The Judgment of the Court was delivered by

Chandra Reddy, C J.—The question that requires an answer in this revision petition is whether the Payment of Wages Authority has jurisdiction to award wages for the period during which the workman was suspended pending enquiry into the charges. The petitioner was employed by the respondent as a cashier on a monthly salary of Rs 100 in addition to free boarding, etc. By an order dated 1st March, 1961, the petitioner was suspended with effect from 3rd March, 1961, pending enquiry into certain charges against him, the details of which need not be set out here. But as no enquiry was started, the petitioner presented an application before the Payment of Wages Authority under section 15 (2) of the Payment of Wages Act (hereinafter referred to as the Act) for an order directing the respondent to pay

* C R P No.604 of 1963. 12th July, 1965.

a sum of Rs. 1,680 as representing his wages up to that date. The Payment of Wages Authority, while rejecting the petitioner's claim for some months on the ground of limitation, directed the respondent to pay the petitioner Rs. 1,120 at Rs. 160 per month for seven months as wages and cost of free food.

The respondent carried an appeal to the Chief Judge of the Court of Small Causes contending that it was not within the powers of the Payment of Wages Authority as the claim does not fall within the ambit of section 15 of the Act. This submission found favour with the Appellate Tribunal with the result that the order of the Payment of Wages Authority was reversed and the application of the petitioner dismissed. In his opinion the Payment of Wages Authority could not decide as to the validity of the suspension of the petitioner by the respondent. It is this judgment of the Chief Judge of the Court of Small Causes that is the subject-matter of this revision case.

The point taken by Sri Ramaswami in this revision case is that the Appellate Tribunal failed to appreciate that section 15 (2) of the Act is attracted to all cases where the wages are withheld for some reason or other and is not confined to cases of withholding of wages for the actual work done by the employee. We are disposed to accede to this proposition. Before we address ourselves to this question it is convenient to look at the terms of section 15. The section rules:—

" (1) The State Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a Stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages. ....

(2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector under this Act or any other person acting with the permission of the authority appointed under sub-section (1), may apply to such authority for a direction under sub-section (3) :

Provided that every such application shall be presented within six months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be.

* * * * * *"

We are not concerned with the other provisions of section 15 We may also mention here that some changes have been introduced into the section but it is unnecessary for the purpose of this enquiry to refer to them as our decisions turns upon section 15 (1) as it stood at the time of the presentation of the application.

Could it be posited that the payment of wages has been delayed as contemplated by sub-section (2)? In our opinion the non-payment of wages for a number of months on the ground of suspension would amount to delaying payment of wages. It is true there is some support for the view taken by the Chief Judge of the Court of Small Causes that so long as the suspension is in operation, it could not be postulated that there has been withholding or delaying payment of wages and it is not for the Payment of Wages Authority to decide whether the suspension was valid or not vide *Venkatavaradan* v. *Sembiam Saw Mills*[1], and *Arumugham* v *Jawahar Mills*[2].

In the first of these cases the employee was first suspended and subsequently discharged from service. He applied to the Commissioner under the Payment of Wages Act for salary for the period during which he was suspended and also damages for wrongful termination of services. The learned Judge thought that the whole claim was in effect damages for wrongful termination of services without treating the claim for wages for the period of suspension as a distinct claim. He held that the proper course, if any, for the employee was to institute a suit for damages and not claim charges under the Act and the forum was not the Commissioner but a civil Court.

In *Arumugham* v. *Jawarhar Mills*[2], Ramaswami, J., held that wages for the period of suspension are not within the contemplation of section 15 (2) as they amount only

1. (1955) 2 M.L.J. 209 A.I.R. 1955 Mad 597.
2. (1956) 1 L.L.J. 519 A.I.R. 1956 Mad. 79.

to potential wages. Moreover, the decision in that case seems to have turned upon the standing orders governing the employment of workmen. As already remarked by us, the theory propounded by the two learned Judges seems to lend colour to the opinion expressed by the Appellate Tribunal.

We feel that the language of section 15 cannot sustain the conclusion arrived at by them. It should be remembered that the contract for service subsists between the employer and employee even during the period of suspension and in the absence of a term in the contract permitting the employer to suspend the employee pending enquiry against him, he must be deemed to be in service and entitled to remuneration, the fact that he was not allowed to work not making any difference in this behalf. In the absence of a rule permitting the employer to suspend the employee for some reason or other, it is not within the powers of the employer to suspend the employee and refuse to pay him wages therefor.

This decision of ours is reinforced by the pronouncement of the Supreme Court in *The Management of Hotel Imperial* v. *Hotel Workers' Union*[1]. It was laid down there that the power to suspend in the sense of a right to forbid a servant to work is not an implied term in any ordinary contract between the master and servant and that such a power can only be the creature either of a statutory provision or a rule or standing order governing the employment or of an express term in the contract itself. The absence of such power either means that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension.

Messrs. Burn & Co. v. *Their Workmen*[2] rendered by the Supreme Court is authority for the proposition that where one is placed under suspension, as a rule, his wages including allowances can be said to be withheld for the time being.

The judgment of the Calcutta High Court in *Union of India* v. *Arjun Singh*[3], contains the principle that the wages payable to a workman suspended come under the purview of section 15. It was held there that the employee could not work because the employer had not respected the contract that existed between the two and if the employee could not render service and actually earn the wages in question, the situation, was *amenable to the Act.*

On the language of section 15 and the decided cases we feel that the wages payable to the employee in a case like the present one come within the range and sweep of section 15 in the absence of a term in the contract, or of a rule, statutory or otherwise or a standing order in that behalf, permitting the employer to do it. We are not persuaded that the absence of a term in the contract prohibiting the employer from suspending the employee enables the employer to suspend the employee as suggested by the learned Counsel for the respondent In our opinion it is the presence of a term in the contract or any provision either in the statute or rule or standing order entitling the employer to suspend the employee that could be basis of suspension.

In the result, we reverse the decision of the Chief Judge of the Court of Small Causes and restore that of the Payment of Wages Authority. This Civil Revision Petition is allowed with costs.

We are thankful to Sri Ghani who assisted us as *amicus curiae* for the respondent.

V.K. *Petition allowed.*

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1. (1960) S.C.J. 317 : 1960 M.L.J. (Crl.) 207 : (1960) 1 S.C.R. 476.
2. A.I.R. 1959 S.C. 529.
3. (1961) 2 L.L.J. 454.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

S. V. K. M. Ratnaswamy Nadar and Brothers, through its Partner, M. Manickavelu Nadar .. *Petitioners**

v.

K. Subbuswamy Iyer and another .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *section* 69—*Scope—Documents relating to merits of the claim marked in evidence—No oral evidence recorded —Subsequent dismissal of suit as settled out of Court—Claim for refund of half the Court-fee—Tenability*

Refund of half the Court-fee under section 69 of the Madras Court-fees Act can be claimed only when a suit is dismissed as settled out of Court before any evidence on the merits of the claim had been "recorded" The argument that the use of the word "recorded" in the section can only refer to the recording of oral evidence and not to the marking of documentary evidence is untenable The word is used only in the sense of being made part of the record Documentary evidence also forms part of the record and hence even if documents relating to the merits of the claim have been marked in evidence and are thus made part of the record the benefit of section 69 will not be available.

When the claim is for refund of revenue lawfully collected, the Court can order refund only where specific authority is given by the statute There is no question of liberal interpretation. Effect must be given to the plain and unambiguous language of the statute.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Munsif, Tirunelveli, dated 22nd January, 1962 and made in I.A. No. 1522 of 1961 in Original Suit No. 614 of 1960.

T. Martin, for Petitioner.

S. D. Ramalingam for Government Pleader (*A. Alagiriswami*), for State.

The Court made the following

ORDER.—This revision has been preferred against the order of the learned District Munsif of Tirunelveli, rejecting the application of the petitioner for refund of half the Court-fee paid on the plaint under section 69 of the Court-fees Act. The suit had been filed in February, 1960, and on 20th November, 1961, the case was taken up for hearing. Two Exhibits, Exhibit A-1 and A-2 were marked in evidence. However, before any oral evidence was recorded in the suit, it was reported as settled out of Court, and it was dismissed.

Section 69 of the Madras Court-fees and Suits Valuation Act, 1955, which provides for refund of half the Court-fees on settlement of the case before hearing runs thus :—

"*Section* 69 —Wherever any suit is dismissed as settled out of Court, before any evidence has been recorded on the merits of the claim, half the amount of all fees paid in respect of the claim or claims in the suit shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid

Explanation —The expression *merits of the claim* shall have the meaning assigned to it in section 12."

The *Explanation* under section 12 provides that the expression "merits of the claim" refers to matters, which arise for determination in the suit, not being matters relating to the frame of the suit, misjoinder of parties and cause of action, the jurisdiction of the Court to entertain or try the suit, and the fee payable, but inclusive of matters arising on pleas of *res judicata*, limitation and the like.

It is not disputed that Exhibits A-1 and A-2, which had been marked in evidence, related to the merits of the claim What the learned Counsel for the petitioner contends is that section 69 speaks of recording of evidence, and unless oral evidence had been recorded, he could claim the benefit of the section, if the suit was settled out of Court, and got dismissed on that ground. Learned Counsel submits that any dismissal of the suit as settled out of Court would entitle the party to refund of the Court-fee, provided no oral evidence had been taken on the merits of the claim. Learned Counsel contends that the use of the word "recorded" in the section can

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*C R P. No. 1376 of 1962. 23rd July, 1965.

only refer to the recording of oral evidence and not to the marking of documentary evidence. To sustain this argument, learned Counsel drew my attention to certain provisions in the Criminal Procedure Code, like section 354, where the word recorded has been used with reference to the evidence of witnesses But a perusal of the section and the connected provisions would show that the word "recorded" is used in the sense of being made part of the record. Section 356 of the Criminal Procedure Code speaks of evidence being taken down in writing, and, on certain formalities as provided in the section being complied with, it forming part of the record. A record generally means an official written report of public proceedings, as of a Legislature or Court of law. It also means documents preserved as evidence of proceedings, as of a Court. Evidence in a case can both be oral and documentary, and instances are not infrequent, where cases are disposed of purely on documentary evidence at times massive. That the word "recorded" is used with reference to documentary evidence also will be clear, if the marginal heading of Order 13, rule 7 of the Civil Procedure Code is referred to, which speaks of recording of admitted and return of rejected documents. Documentary evidence also forms a part of the record of the case, and therefore, gets recorded like oral evidence. Section 69 of the Court-fees Act refers to any evidence being recorded , that means, even if documentary evidence, relating to the merits of the claim, has gone into the record, the party will not be entitled to the benefit of section 69. The argument is without substance.

Learned Counsel for the petitioner relied upon the decision of this Court in *Paramasiva* v. *Krishnaveni*[1], but I do not think that the case in question is of any help to the petitioner. There, the suit had been filed for three reliefs, and on an interlocutory application, arguments were heard and judgment rendered in favour of the plaintiff with regard to one of the reliefs. Subsequently the remaining two reliefs were settled out of Court, and the suit was withdrawn and dismissed. Venkataraman, J., holding that the two reliefs, on which there had been no adjudication, were separable from the one for which a decree had been given, directed refund of half the Court-fee on the two reliefs. It is observed in the judgment that no evidence had been recorded on the merits of the claim. What is relied upon by the petitioner's Counsel is an observation in the judgment that a few documents had been looked into. But this reference was in relation to the part of the case on which there was a judgment. In respect of the reliefs which had been held over, no evidence was recorded. This case is distinguishable, as all that it holds is that, when reliefs are severable, and there had been no adjudication in respect of some of the reliefs, and no evidence recorded on the merits of claim, relating to those reliefs there could be refund of Court-fee with referene to those reliefs, if the claim in regard to them was settled out of Court, and the suit got dismissed.

Here, documents have been marked in evidence, and they have gone into the record as evidence in the case, on the merits of the claim. The language of section 69 does not give any room for doubt. Clearly, the suit in this case was got settled after evidence had been recorded on the merits of the claim. As pointed out by Ganapatia Pillai, J., in *Padmanabha* v. *Naraindas*[2], where the claim is for refund of revenue lawfully collected by the State, the Court could exercise jurisdiction to make orders for refund only where specific authority is given to the Court under the Madras Court-fees and Suits Valuation Act XIV of 1955. There is no question of liberal interpretation of the Act in such a case. Effect must be given to the plain and unambiguous language of the statute. The view of the Court below, that admission of documentary evidence is also recording of evidence and that the provisions of section 69 are not attracted, is correct, and the order does not call for interference. The revision, therefore, fails and is dismissed No costs.

V.K. *Petition dismissed.*

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1. (1965) 1 M L J. 169 : I L R (1965) 2 Mad 323.
2. I L R. (1963) Mad. 1000.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Ching Chong Sine *alias* C. H. Chin .. *Petitioner**

v.

Puttay Gowder .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25 *and Civil Procedure Code (V of* 1908), *section* 115—*District Judge—Power of revisions—Appellate Rent Control orders—Propriety—Meaning of—Different conclusion on proved facts—Open to District Judge.*

Section 12 (*b*) of the Madras Rent Control Act of 1949 and section 25 of the Act of 1960 enable the District Judge in the case of mofussal cases and the High Court in cases arising in the City to consider the lower Court's order with regard to its legality, propriety and regularity It is open to consider the propriety of an order made by the subordinate authority and come to a different conclusion on the facts proved

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of Coimbatore dated 1st July, 1963 and made in C.R P. No. 1052 of 1962 (C M.A No. 2 of 1962, Sub-Court, Ootacamund H R C No. 69 of 1960, Rent Controller, Ootacamund).

A. K. Sreeraman, for Petitioner.

P. S. Balakrishna Ayyar and *P. S. Ramachandra Ayyar,* for Respondent.

The Court delivered following

JUDGMENT.—This is an application under section 115 of the Code of Civil Procedure to revise the order of the learned District Judge of Coimbatore in C.R.P. No. 1052 of 1962. The learned District Judge allowed a revision by the landlord against the judgment of the learned Subordinate Judge of Ootacamund in C.M.A. No. 2 of 1962, by which the learned Subordinate Judge reversed the order of the House Rent Controller in H.R.C No 69 of 1960, and held that there was no wilful default by the tenant justifying his eviction. The learned District Judge came to the conclusion that there was wilful default and so allowed the revision. Realising the limitations of section 115, Civil Procedure Code, Mr A. K. Sreeraman, learned Counsel for the petitioner, has urged that the learned District Judge in so far as he differed from the Subordinate Judge and held that there was wilful default in the payment of rent by the tenant was either exercising a jurisdiction not vested in him or acted with material irregularity and therefore this Court in exercise of its powers under section 115, Civil Procedure Code should interfere.

I am afraid the arguments of the learned Counsel for the Petitioner as to the ambit of section 25 of the Madras Buildings (Lease and Rent Control) Act are not justified by the wording of that section. He has referred me to two decisions of this Court, one of Rajagopala Ayyangar, J., in C.R.P. No. 1420 of 1954 and another by Rajamannar, C.J., in *Saswarna Thevar* v. *Ponnu*[1]. In the case decided by Rajamannar, C.J., he extracts with approval a paragraph from the judgment of Rajagopala Ayyangar, J , which reads thus :

"The only proper way of defining the relative jurisdiction of the appellate and revisional authorities constituted under the Madras Buildings (Lease and Rent Control) Act is to hold that while an appellate authority is entitled to examine every question of fact and law dealt with, in or arising out of, an order of the Rent Controller a revisional authority, while undoubtedly can interfere with the questions of law, where the Rent Control Act or any provision has been misconstrued, cannot normally interfere with findings of fact unless (*a*) there were no other materials on which such a finding could be based , or (*b*) the finding has been reached by a consideration of irrelevant or inadmissible matter ; or (*c*) it is so perverse that no reasonable person could have reached that conclusion , or (*d*) the finding had been reached by an erroneous understanding of the law applicable to the matter To hold that a revisional authority could interfere with findings of fact of an appellate authority without regard to these limitations would be to convert a revision into a regular appeal and to obliterate the distinction between appeals and revisions which the Act has taken care to provide "

With great respect to the learned Judges, I cannot help feeling that both their Lordships have not considered the words of section 12 (*b*) of the old Madras Buildings (Lease and Rent Control) Act, 1949, or section 25 of the present Act, which enable

*C R P. No 1546 of 1963 31st August, 1966.

1. (1957) 1 M L J 158

the District Court in the case of mofussil cases and the High Court in cases arising in the city to consider the lower Court's order with regard to its legality, propriety and regularity. There is no reference in either of the two judgments, to the exact implications of these words.

The implications of the word ' propriety ' have been considered by the Supreme Court in *Raman and Raman Ltd.* v. *Government of Madras*[1], thus :

"The word ' Propriety ' has nowhere been defined in the Act and is capable of a variety of meanings In the Oxford English Dictionary (Vol VIII) it has been stated to mean fitness , appropriateness , aptitude , suitability , appropriateness to the circumstances or conditions , conformity with requirements, rules or principle , rightness, correctness, ' justness, accuracy ' *If the State Government was of the opinion that respondent 2 had better facilities for operation than the appellant and their services to the public would be more beneficial, it could not be said that the State Government was in error in thinking that the order of the Board confirming the order of the Regional Transport Authority was improper* "

Now, the last sentence would show that from the same set of circumstances, it is open to an authority exercising a power similar to the one under consideration to consider the propriety of an order made by a subordinate authority and come to a different conclusion from the subordinate authority. In *Moti Ram* v. *Suraj Bhan*[2], the Supreme Court points out that under section 15 (5) of the Punjab Act (which was the section under consideration in that case), the High Court has jurisdiction to examine the legality or propriety of the orders under revision and that would clearly justify the examination of the propriety or the legality of a finding made by the authorities about the requirement of the landlord under section 13 (3) (*a*) (iii).

Now, reading the above statement of the law along with that contained in *Raman and Raman Ltd.* v. *Government of Madras*[1], it is obvious that a Court like the District Court in the present case has the power to come to a conclusion different from that arrived by the subordinate Court on the same set of circumstances. Mr. Sreeraman urged that it was not open to the District Court in revision to come to a conclusion different from the subordinate Court. It is not as though the subordinate Court in this case was the Trial Court. It has often been observed, while meeting the arguments advanced in appeals that an appellate Court should not lightly interfere with a finding of fact arrived at by a trial Judge who had the opportunity of hearing witnesses and observing their demeanour, that while the trial Court, which has had such an opportunity, might be in a better position to assess the credibility of the witnesses and, therefore be in a better position in coming to a conclusion as to a finding of fact, it does not stand in a better position than an appellate Court with regard to the conclusion to be drawn from the proved facts and that in such a case, an appellate Court is in as good a position as the trial Court to draw its own conclusions. What the learned District Judge has done in this case is not to differ from the learned Subordinate Judge and to come to his own conclusions as regards facts, but to draw his own conclusions on the facts proved, and I am unable to agree with the learned Advocate for the petitioner that this was something which the learned District Judge was not competent to do. It follows that the judgment of the learned District Judge, in so far as he reversed the judgment of the Subordinate Judge, falls clearly within the ambit of section 25 of the Madras Buildings (Lease and Rent Control) Act. As such, there is no room for exercise of revisional powers of this Court.

This petition is dismissed with costs. Time for vacating six months.

V.S *Petition dismissed*

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1 (1956) S.C.J. 368 (1956) S.C.R 256 (1956) I M L J (S C) 169 . A I R 1956 S C. 463.

2 (1960) S C J 699 (1960) 2 S.C.R 896 : A I R 1960 S.C 655.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—MR JUSTICE P S. KAILASAM.

Shri V G Row .. *Petitioner**

v.

Shri N. Krishnaswamy Reddy and two others . *Respondents*

Constitution of India (1950), *Article* 217 (2) (b)—*Eligibility for being appointed as a High Court Judge—Requirement of being for at least ten years "an Advocate of the High Court"—Actual practice before the High Court for ten years if necessary—Allegation of* mala fides *against the State Government—Effect on appointment.*

Constitution of India (1950), *Article* 132 (1)—*Certificate to appeal to Supreme Court under from judgment of single Judge of High Court—Grant of when remedy of appeal to Division Bench not pursued—Practice.*

When Article 217 (2) (*b*) of the Constitution of India states that a person shall not be qualified for appointment as a Judge of a High Court unless he has for at least "ten years been an Advocate of a High Court", it does not require that the person concerned should have been actually practising before a High Court for at least ten years. What it requires is that for qualifying to be a Judge one must be a person of at least ten years standing as an Advocate of a High Court which means an Advocate entitled as of right to practise in the High Court for the specified period. There is no justification for classifying the Advocates who are entitled as of right to practise in the High Court into two categories of persons actually practising in the High Court and persons not actually practising in the High Court for the purpose of Article 217.

The appointment of a High Court Judge is by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The State Government is not directly concerned with the appointment. Hence allgations of *mala fides* against the State Government in pushing through an appointment cannot invalidate the appointment since it would be futile to contend that the President, the Chief Justice of India and the Chief Justice of the High Court were directly or indirectly influenced by the State Government in the appointment of a Judge

(The Court refused to grant a certificate to appeal to the Supreme Court under Article 132 (1) of the Constitution of India though according to it the matter involved the interpretation of an Article of the Constitution on the ground that the petitioner had a remedy by way of an appeal to a Bench of the High Court)

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *quo warranto* against the 1st respondent, calling upon him to furnish information, underwhat authority he holds the Public Office of a Judge of the High Court of Judicature at Madras after calling for the records from the 2nd and 3rd respondents herein pertaining to his appointment

G. Vasantha Pai, for Petitioner.

The Court made the following

ORDER.—This petition is filed for the issue of a writ in the nature of *quo warranto* against the first respondent, calling upon him to furnish information under what authority he holds the Public Office of a Judge of the High Court of Judicatue at Madras, after calling for the records from the second and third respondents.

The first respondent was appointed as a Permanent Judge of this High Court on 8th July, 1966, and he assumed office on the same date He was enrolled as an Advocate of this Court on 11th December, 1939 It is stated that he elected to practise in the subordinate Courts at Chingleput till December, 1960, when he was appointed as Public Prosecutor, Madras High Court. He was appointed Advocate-General in 1964, which office he held till his appointment as a High Court Judge According to the petitioner, on the date of his appointment as High Court Judge, the first respondent had only 5 years and 7 months practice in the High Court. The facts stated may be taken as correct, for the purposes of this petition The appointment is challenged on the ground that the first respondent does not satisfy the qualification of being an Advocate of a High Court for at least 10 years before the date of his appointment The validity of the appointment is also attacked on the ground that the appointment was not made in accordance with the letter and spirit of the Constitution, and that the State Government committed fraud on the Constitution by conferring on the first respondent a preferment.

* W.P. 2022 of 1966. 9th August, 1966.

The relevant portion of Article 217 of the Constitution of India may be extracted :

"(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, .. . (2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and (*a*) . (*b*) has for at least ten years been an Advocate of a High Court or of two or more such Court in succession ".

The contention of Mr Vasantha Pai, the learned Counsel for the petitioner, is that the words 'has for at least ten years been an Advocate of a High Court' could only be construed to mean that he was actually practising before a High Court for ten years Reliance was placed on Article 233 of the Constitution is support of this contention. Article 233 relates to the appointment of District Judge and provides that a person shall only be eligible to be appointed as a District Judge, if he has been for not less than seven years an Advocate or a Pleader It was contended that, while an Advocate or Pleader of seven years is qualified to be appointed as a District Judge, Article 217 required that a person 'has for at least ten years been an Advocate of a High Court' The words 'Advocate of a High Court' in contra distinction to the word 'Advocate' simpliciter used in Article 233 are relied on, to substantiate the contention that an Advocate of a High Court could only mean an Advocate practising in the High Court

The Government of India Act, 1935, section 220 (3) provided that a person shall not be qualified for appointment as a Judge of a High Court unless he had for at least ten years been a Pleader of any High Court The provision relating to the appointment of a District Judge found in section 254 was that the person should have been for not less than five years a Barrister, a member of the Faculty of Advocates in Scotland, or a Pleader Thus, while section 220 clause (3) (*d*) would mention the words "a Pleader of any High Court", section 254 mentioned only "a Pleader" without the words "of any High Court".

Clause 9 of the Letters Patent empowered the High to enrol Advocates, Vakils and Attorneys The Legal Practitioners Act, 1879, provided for the entry of Advocates and Vakils Section 4 provided that every person entered as an Advocate or Vakil on the roll of any High Court under the Letters Patent shall be entitled to practise in all the subordinate Courts Provision was also made for the High Court making rules for prescribing the qualifications, admission and certificates of proper persons to be Pleaders of the subordinate Courts. Under the Legal Practitioners Act, there were two classes (1) Advocates and Vakils on the roll of a High Court under the Letters Patent, and (2) Pleaders who were entitled to practise in the subordinate Courts The Indian Bar Councils Act, 1926, provided for admission and enrolment of Advocates. Section 8 (1) provided that no person shall be entitled as of right to practise in any High Court, unless his name was entered in the roll of the Advocates of the High Court maintained under the Act. Section 8 (2) empowered the High Court to prepare and maintain a roll of Advocates of the High Court in which shall be entered the names of (*a*) all persons who were, as Advocates, Vakils or Pleaders, entitled as of right to practise in the High Court immediately before the date on which the Act came into force, and (*b*) all other persons who have been admitted to be Advocates of the High Court under the Act Thus, the section contemplated a roll consisting of persons who were Advocates, Vakils and Pleaders entitled as of right to practise in the High Court, and persons who were admitted to be Advocates of the High Court under the Act Certain requirements as to payment of stamp duty was also provided in the case of Advocates, Vakils and Pleaders who were entitled as of right to practise In the context of the provisions of the Letters Patent, the Legal Practitioners Act and the Indian Bar Councils Act, if the words in Article 217 and Article 233 are examined, it will be clear that for qualifying to be a Judge, one must be a person of at least ten years' standing as an Advocate of a High Court which would mean an Advocate entitled as of right to practise in the High Court, whereas Article 233 would also include a person who is an Advocate or Pleader

not so entitled as of right to practise in the High Court The Government of India Act, 1935, instead of the word 'Advocate' used the words "Pleader" There is nothing in the Constitution of India or the Government of India, Act, 1935, from which it can be inferred that a condition that person must be practising in the High Court itself, has been superimposed Whether such a provision is desirable or not, we are not concerned But I do not find any justification for classifying the Advocates who are entitled as of right to practise in the High Court into two categories of persons actually practising in the High Court and persons not actually practising in the High Court for the purpose of Article 217 of the Constitution I am, therefore, unable to accept the contention of the petitioner

The petitioner has alleged that the State Government did not act in terms of the Constitution, and were influenced by extraneous and irrelevant considerations, and that they committed fraud on the Constitution The appointment of a High Court Judge is by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court The State Government are, therefore, not directly concerned with the appointment It is unnecessary to go into the question whether the State Government were actuated by extraneous and irrelevant considerations, as it is futile for the petitioner to contend that the President, the Chief Justice of India and the Chief Justice of the High Court were directly or indirectly influenced by the State Government in the appointment In this view, it is unnecessary to consider the allegation against the State Government

There are no merits in this petition and it is therefore dismissed

Mr. Vasantha Pai, learned Counsel for the petitioner prays that a certificate to appeal to the Supreme Court under section 132 (1) of the Constitution may be granted in view of the importance of the question He relied on a decision of the Supreme Court in *Election Commission* v *Venkata Rao*[1], in support of his contention that a certificate can be issued by a single judge of this Court The matter involves the interpretation of an Article of the Constitution But I am not inclined to grant a certificate as the petitioner has got a remedy by way of an appeal to a Bench of this Court The petition is dismissed.

V K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE K. SRINIVASAN.

V. G. Row .. *Petitioner**

v.

A Alagiriswamy and two others *Respondents*

Constitution of India (1950), *Article* 217 (2) (b) *read with the* Explanation—*Eligibility for being appointed as a High Court Judge —Expression ' has been an Advocate of a High Court '—If means ' has been practising before a High Court'—Scope of the* Explanation—*Judicial Office of District Munsif held during pre-Constitution period by a person after he became an Advocate—If can be taken into account in considering his eligibility.*

Constitution of India (1950), *Article* 132 (1)—*Appeal to Supreme Court from judgment of single Judge of High Court, side-tracking remedy of appeal to Division Bench—Grant of certificate—Practice*

Article 217 (2) (*b*) of the Constitution of India does not in terms require that before an Advocate could be appointed as a Judge of the High Court he should have been for at least ten years, practising in that or any other High Court, it would suffice if he were entitled to practise in a High Court for the requisite period It is difficult to hold that the expression ' has been an Advocate of a High Court ' in Article 217 (2) (*b*) should be taken to mean ' has been practising before the High Court ' If that was the underlying intention, it could have been so expressed The colourless expression ' has been an Advocate of a High Court ' has been designedly put in only to ensure the necessary legal qualification and standing as an Advocate leaving out other matters which may call for a practical approach, such as the assessment of the ability of the Advocate, the volume of his practice, his standing at the Bar and the like Thus the Article does not require that the person concerned should have practised before a High Court for the requisite period and that if he has confined his practice to the Courts other than the High Court, he lacks the qualification prescribed

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1 (1953) S C J 293 (1953) 1 M L J 702 A I R 1953 S C 210

* W.P No. 2047 of 1966 17th August, 1966.

The *Explanation* to the Article 217 states that in computing the period during which a person has been an Advocate of High Court there shall be included any period during which the person held judicial office after he became an Advocate The expression ' after he became an Advocate ' occurring in the later part of the *Explanation* could not be read as ' after he became an Advocate of the High Court ' that is in the sense that after he started practising in the High Court Any period during which a person held a judicial office after he became an Advocate should be included What is excluded by the *Explanation* is only the period when the person held judicial office before he became an Advocate.

The fact that the judicial office of the District Munsif was not an adequate qualification for appointment as a Judge of a High Court under the Government of India Act (1935) does not mean that in considering the eligibility of a person for appointment as a Judge under Article 217 read with the *Explanation*, the period during which the post of District Munsif was held by that person during the pre-Constitution period should be ignored The Constitution of India designedly dropped the limitation upon the nature of the judicial office contained in the Government of India Act (1935) in so far as the appointment of the High Court Judge is concerned and since the post of a District Munsif would undoubtedly be a judicial office under the Constitution the period during which a person held the office of District Munsif after he became an Advocate during the pre-Constitution period could be taken into account under the *Explanation* to Article 217 in considering whether he had the requisite qualification for being appointed as a High Court Judge under Article 217 of the Constitution

In the instant case the appointment of the respondent (Mr Alagiriswami) as a High Court Judge could not be challenged. In addition to having been an Advocate of the High Court practising in the mofussil Courts between 1936 and 1941 he held the judicial office of District Munsif intermittently during 1941 to 1947 and he did so after he became an Advocate having been enrolled in 1936 If this period is added to the period during which he acted as Government Pleader (1960 to 1966) there can be no doubt that he has been an Advocate of a High Court for at least ten years as required by Article 217.

The fact that the appointment of the respondent as Government Pleader was declared by a Bench of this High Court in a contested proceeding to have been made for extraneous purposes could not render him ineligible for appointment as a High Court Judge for ever

The qualification required by Article 217 were fulfilled by the respondent and if so it was open to those in authority to suggest the name of the respondent for appointment as a Judge. It would be difficult to see how such an appointment could be said to be a fraud on power or affected by *mala fides*.

(The Court refused a certificate under Article 132 (1) of the Constitution of India to the petitioner to enable him to appeal to the Supreme Court from this judgment on the ground that though the question raised was one of importance it was not of such urgency that the normal venue of appeal to a Division Bench of the High Court should be side-tracked)

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *quo warranto* against the 1st respondent calling upon him to furnish information under what authority he holds the Public Office of an Additional Judge of the High Court of Judicature at Madras after calling for the records from the 2nd and 3rd Respondents herein pertaining to his appointment

G. Vasantha Pai, for Petitioner

The Court made the following

ORDER —Sri Alagiriswami, the 1st Respondent to this petition was appointed an Additional Judge of this High Court on 8th of August, 1966 On the 11th of August, 1966, this petition seeking the issue of *quo warranto* calling upon the first respondent to show under what authority he holds the office in question was filed The petitioner is a member of the High Court Bar and has been a practitioner before this Court for the last 34 years He claims that as a member of the Bar, he is vitally interested in the purity of the administration of justice and for reasons that would be apparent from what follows, he finds it to be his duty to move this Court in this matter.

According to the petitioner, Sri Alagiriswami does not possess the qualification prescribed by Article 217 (2) (*b*) of the Constitution Secondly, it is contended that the appointment has been made virtually in the teeth of a Bench decision of this Court in which on an earlier occasion the propriety of the appointment of Sri Alagiriswami as Government Pleader was brought into question and it was held by this Court that that appointment was an act of favouritism intended to shepherd the first respondent to a High Court Judgeship through the backdoor Though this Court felt powerless to interfere with the first respondent's appointment as Govern-

ment Pleader, the decision of that Bench established that in making that appointment, the Government was moved by extraneous consideration, principally that of conferring upon the first respondent a qualification solely for the purpose of enabling him to become a Judge of the High Court It is said accordingly that the appointment of the first respondent as a Judge is the fulfilment of the scheme engineered by those in authority when the first respondent was some years ago appointed as Government Pleader, and on this ground his appointment is attacked as affected by *mala fides* and is fraud on power.

These are the two grounds, broadly speaking, that have been amplified in the lengthy affidavit accompanying the petition I do not think it necessary to set out the contents of the affidavit in any great detail but I shall refer to such portions thereof as may be required.

Under Article 217 (2) (*b*), a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and has for at least ten years been an Advocate of a High Court or of two or more such Courts in succession It is the contention of Mr G Vasantha Pai, learned Counsel for the petitioner, that at the best it can be said that the first respondent has been an Advocate of the High Court since the date of his appointment as Government Pleader on the 1st July, 1960, and not earlier. Before commenting upon this particular contention, the following facts are necessary to be set out These facts appear in the affidavit itself The first respondent was enrolled as an Advocate for the High Court in 1936, but he chose to practise only in the mofussil Courts, principally at Madurai, at that time In 1941, he was appointed as District Munsif, undoubtedly a judical office, and served in that capacity between 1941 and 1947. It is said that he was functioning intermittently, but no precise dates are given which would indicate the length of that service. Simultaneously with this appointment to the Judicial Service, he had necessarily to cease practice as an Advocate Between 1947 and 1959, he occupied various posts. They were not posts which could be regarded as judicial posts For about a year, thereafter, he acted as Principal Judge of the City Civil Court at Madras As stated already on 1st July, 1960, he was appointed as Government Pleader. The contention of Mr Vasantha Pai is that the qualification prescribed by the above Article as an Advocate of a High Court requires the qualification of a 'practising' Advocate of a High Court and not merely a person who has been enrolled as an Advocate of the High Court who for a variety of reasons practises elsewhere than before the High Court; that is to say, the expression 'has for at least ten years, been an Advocate of a High Court' means according to the learned Counsel a person who has for that period been actively practising as an Advocate in the High Court and not elsewhere That an Advocate normally means a practising Advocate may be accepted without any difficulty Learned Counsel has referred to the history of legislation in this regard and pointed out that the Charter establishing the Supreme Court of Judicature at Madras, 1800, referred to persons enrolled and authorised to appear and plead and act for the suitors of the said Court In the High Courts Act of 1861, in providing for the qualifications of persons to be appointed as Judges, section 2 of 24-25 Vic, Chapter 104 says,

> "Persons who have been Pleaders of a Sadar Court or High Court for a period of not less than ten years, if such Pleaders of a Sadar Court shall have been admitted as Pleader of a High Court"

Learned Counsel seeks to draw the inference from the form used herein that only Pleaders who have been actually practising before the High Court are contemplated and it was in that sense that the earlier Acts dealt with the question In the 1915 Act, under section 96 (2) (*d*), the qualification of a person to be appointed as a Judge was that he should have been a Pleader of a High Court for a period of not less than ten years The use of the word 'Pleader' in the earlier Acts, it is said, was for the reason that a person should have pleaded in the Indian sense, that is to say, should have actually appeared on behalf of the suitor and pleaded the cause. Learned Counsel accordingly urges that Article 217 (2) (*b*) equally requires that the expression 'Advocate of a High Court' should be so interpreted as to mean that he should have been an Advocate, not merely enrolled as an Advocate of the High

Court but should have continuously practised as such Advocate in the High Court for at least ten years

Pursuing this line of argument, it is further pointed out that where a person enrolls himself as an Advocate, he is required under the relevant rules, the Bar Council Rules and the High Court Original Side and Appellate Side Rules, to indicate where he ordinarily desires to practise This would also show that despite the fact that a person has been enrolled as an Advocate of the High Court, the venue of his practice is of importance and of the greatest importance when the question of an Advocate's qualification for appointment as a Judge is concerned

In contrast to Article 217 (2) (*b*), reference has been made in the course of the arguments to Article 233 (2) which relates to the appointment of District Judges This provision states that a person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an Advocate or Pleader and is recommended by the High Court for appointment. The use of the expression 'an Advocate' not qualified in the manner in which it is qualified in Article 217 (2) (*b*) is relied on, on behalf of the petitioner to indicate the intention underlying the qualification of a person for High Court Judgeship.

It is somewhat difficult to agree that this Article of the Constitution interpreted as it stands compulsorily requires that the expression 'has been an Advocate of a High Court' should be taken to mean 'has been practising before the High Court.' If that was the underlying intention, it could have been so expressed The difficulty of insisting upon such a qualification is very apparent, for it is impossible to say whether an Advocate who handles very few briefs in a year could be said to be actually practising The makers of the Constitution could not have been unaware that very many persons are enrolled as Advocates of the High Court but have little, or no work by way of pleading or acting It is no doubt true that practising as an Advocate is an essential requisite before those entrusted with the selection of a person to be a Judge would sponsor his case. But this is a matter which the Constitution makers apparently left to be examined by the persons charged with the duty of selection. The colourless expression 'has been an Advocate of a High Court' has to my mind been designedly put in only to ensure the necessary legal qulification and standing as an Advocate, leaving out other matters which may call for a practical approach, such as the assessment of the ability Advocate, the volume of his practice, his standing at the Bar, and the like In the absence of anything which would compel the particular construction which learned Counsel seeks to put upon it I am of opinion that the Article does not require that the person should have practised before a High Court as an Advocate and that if he has confined his practice to the Courts other than the High Court, he lacks the qualification prescribed. Learned Counsel sought to support his argument by reference to some debates in the Constituent Assembly where apparently an attempt was made to amend the Article regarding the qualification of a person for appointment as a Judge of the Supreme Court by including a Pleader practising for a certain minimum period, in a District Court and that amendment was rejected. That has only been relied upon for the purpose of showing that when reference is made in the Constitution to an Advocate, it refers to a practising Advocate and when it is made to an Advocate of a High Cours, it refers to an Advocate who has been practising before a High Court. As I said, I am unable to agree with this interpretation. It was pointed out by the learned Counsel again that there is no case of an Advocate who has practised in the mofussil being appointed as a Judge of the High Court. That to my mind will not be of assistance in interpreting the words of a written Constitution.

In a Writ Petition disposed of by Kailasam, J.[1] in which an identical question arose and precisely the same arguments appear to have been advanced by Mr. Vasantha Pai, the learned Judge observed, referring to the Bar Councils Act, 1926, that a roll of the Advocates had to be prepared by the High Court under

1. Since reported as *V. G. Row* v. *N Krishnaswami Reddy*, (1967) 1 M.L.J. 8.

section 8 (2) of the Act, including all persons who were as Advocates, Vakils or Pleaders entitled as of right to practise in that High Court and of other persons who have been admitted to be Advocates of the High Court under the Act. The learned Judge held that an Advocate of a High Court accordingly meant a person who was an Advocate and had the right to practise in the High Court. He repelled the contention, that for the purpose of Article 217, Advocates should be classified, one into a category of persons actually practising in the High Court and another into one of persons not actually practising in the High Court The decision in that case was accordingly that this Article of the Constitution does not in terms require that before an Advocate could be appointed as a Judge of the High Court, he should have been actually practising in that or in any other High Court for the requisite period, but that it would suffice if he were entitled to practise in a High Court. With respect, I agree with this view.

Mr. Vasantha Pai's next contention is that at the best, the first respondent has been an Advocate of the High Court only for six years since his appointment as Government Pleader in 1960. He claims that any earlier period during which the first respondent held judicial office cannot be included in the light of the *Explanation* to this Article. The *Explanation* thereto which states that:

"In computing the period during which a person has been an Advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an Advocate."

The argument here is that since the first respondent became an Advocate in the sense of practising Advocate of the High Court only on 1st July, 1960, when he was appointed Government Pleader, any period during which he held judicial office subsequent to that date can alone be included and not any period prior to 1st July, 1960 I have already stated that in addition to having been an Advocate of the High Court practising in the mofussil Courts between 1936 and 1941, Sri Alagiriswami held judicial office as District Munsif between 1941 and 1947. It is that latter period which Mr. Pai claims cannot be included under this *Explanation* as he interprets it. It will be noticed that even in this *Explanation*, both the expressions 'Advocates of a High Court' and 'an Advocate' are used. Mr. Vasantha Pai claims that the expression 'after he became an Advocate' occurring herein should be read 'after he became an Advocate of a High Court,' that is to say, after he started practising in that High Court. The use of the two different expressions in the body of the same *Explanation* is significant and in other parts of the Constitution, the word 'Advocate' alone has been used in a context where Mr. Pai does not deny that that would include an Advocate practising in a mofussil Court. The holding of the judicial office after he became an Advocate referred to in the *Explanation* cannot to my mind be so interpreted as to exclude the holding of such office by Sri Alagiriswami between 1941 and 1947. The two expressions 'an Advocate of a High Court' and 'an Advocate' are used in juxtaposition and grammatically construed must have different meanings. If that were otherwise, the Constitution could well have used the expression 'after he became such Advocate.' What the *Explanation* excludes is only the period when the person held judicial office, *before* he became an Advocate. It is not and cannot be denied that when Sri Alagiriswami held judicial office as District Munsif (between 1941 and 1947) he did so after he had become an Advocate, having been enrolled in 1936.

Pursuing the same line of argument, Mr. Pai urges that the judicial office so held by Sri Alagiriswami was in the pre-Constitution period and at that time when the Government of India Act was in force, a judicial office such as that of a District Munsif was not an adequate qualification for appointment as a Judge of a High Court. It is true that, holding a judicial office lower than that of a Subordinate Judge was not within the scope of the qualification for appointment as a Judge of a High Court under the Government of India Act, 1935. But that does not mean that we have to interpret the relevant provision in our Constitution in the light of that ineligibility under the Government of India Act. It will be noticed that in Article 124, *Explanation* II, any period during which a person has held, judicial

office not inferior to that of a District Judge after he became an Advocate can be included in computing the period during which a person has been an Advocate for the purpose of that Article Clearly then, where it was thought necessary to specify the nature of the judicial office, the Constitution has taken care to do so. The Constitution designedly dropped the limitation upon the nature of the judicial office contained in the Government of India Act, in so far as the appointment to the High Court is concerned. I am unable to agree with Mr. Vasantha Pai that since the holding of the post of a District Munsif was not the holding of a judicial office for the purpose of appointment of a High Court Judge, under the Government of India Act, a like construction should be adopted in construing the *Explanation* to Article 217.

It is not denied that if this period is included and added to the period during which the first respondent has been Government Pleader, he has been an Advocate of a High Court for at least ten years.

The next contention of Mr. Pai is that in making the impugned appointment, the authorities have been guilty of the exercise of a fraud on power. This argument is put in this way I have referred to the earlier proceeding before a Bench of this Court wherein the appointment of Sri Alagiriswami as Government Pleader was questioned Balakrishna Ayyar, J., one of the Judges forming the Bench, thought that the Government misused their power and that the apparent suitability of Sri Alagiriswami to be appointed Government Pleader really concealed the true intention of the Government to confer a qualification on Sri Alagiriswami to be considered for the post of a Judge of the High Court in the future. Finally, however, the learned Judges held that the rules for the appointment of Government Pleader as they stood only required that the person appointed should have been an Advocate of the High Court as on the date of the appointment and nothing more, which qualification the appointee fulfilled. Mr Vasantha Pai urges that what was schemed by those in authority who appointed Sri Alagiriswami as Government Pleader has really been effectuated at the present time by the present appointment. He refers to In re *A. K. Gopalan*[1], wherein Satyanarayana Rao, J , quoted the case of *Burghus* v. *Attorney-General*[2].

> " It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue and it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it."

Equally, it is said that when a Bench of this Court had in such categorical terms pronounced upon the appointment of Sri Alagiriswami as Government Pleader that decision cannot be ignored by those who chose to appoint him as a Judge In the affidavit accompanying the petition, it is further asserted that at about the time when the name of Sri Alagiriswami was proposed for appointment as an Additional Judge, the Executive took advantage of the fact that the post of the Chief Justice of this High Court was filled by an Officiating Chief Justice, and the permanent incumbent was acting as the Governor, and it was in those circumstances that the Executive managed to get the approval of the Governor and the Officiating Chief Justice to the name of Sri Alagiriswami being sent up to the President for appointment If what is claimed by Mr. Vasantha Pai is that since the appointment of Sri Alagiriswami as Government Pleader was declared by this Court in a contested proceeding to have been made for an extraneous purpose, *viz* , to render him eligible for appointment as a Judge in the future, his name should not have been proposed at all or accepted for appointment, it seems to be to go far beyond the real effect of that decision. Whether his appointment as Government Pleader won judicial approval or not, that he was Government Pleader between 1960 to 1966 cannot be gainsaid, and that is undoubtedly a period during which Sri Alagiriswami was an Advocate of the High Court, even in the sense of an Advocate, practising in the High Court I am unable to agree with Mr. Vasantha Pai that solely for the reason that the earlier decision impeached the propriety of Sri Alagiriswami's appointment

1. (1952) 2 M.L.J. 690. 2. L.R. (1912) 1 Ch. 173.

as Government Pleader, his further chances of elevation to the Bench should be for ever lost, for that is in effect the argument advanced.

Nor am I able to see how there can be said to be any fraud on power If the qualifications required by Article 217 obtain in the case, it was open to those in authority to suggest the name of Sri Alagiriswami for appointment as a Judge. Under Article 217, a Judge of a High Court is appointed by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. Having regard to the wide publicity which the earlier decision of this Court had, that is, the proceeding in which the appointment of Sri Alagiriswami as Government Pleader was challenged, there is no doubt that the facts relevant thereto would have been within the knowledge of the appointing authority, the President. If the President took note of the qualifications prescribed by the Article and was satisfied that the first respondent did have those qualifications, I am unable to see how such an appointment could be said to be affected by any *mala fides*, whatever breach of good faith and propriety the earlier proceedings six years ago might have tended to show on the part of the State Government. This argument fails to convince me.

I am satisfied that both the contentions advanced on behalf of the petitioner cannot be accepted. The petition is therefore dismissed

Mr. G. Vasantha Pai prays that a certificate under Article 132 (1) of the Constitution may be granted. In my opinion though the question raised is one of importance it is not of such urgency that the normal venue of appeal to a Bench of this Court should be side-tracked. I decline to grant the certificate.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

PRESENT:—MR. P. CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE M. NATESAN.

Palaniswami Goundar and others .. *Appellants**

v.

Special Tahsildar, Land Acquisition, Harijan Welfare, Erode, and others .. *Respondents.*

Land Acquisition Act (I of 1894), sections 4 (1), 5-A and 17 (4)—Notification under section 4 (1) also containing direction under section 17 (4) for dispensing with enquiry under section 5-A—Validity

A notification under section 4 (1) of the Land Acquisition Act notifying that a certain land is required for public purpose would not be invalid merely because it also includes a direction under section 17 (4) for dispensing with the provisions of section 5-A in view of the urgency of the case. There is nothing in the language of section 17 (4) to warrant the contention that the Government has to apply its mind to the problem bearing on section 5-A only after the preliminary notification under section 4 (1). No such sequence is provided in that section and it does not require that the issue of the section 4 (1) notification and the direction to dispense with section 5-A enquiry should be in two stages and that Government should wait till after the section 4 (1) notification for invoking section 17 (4). The decision as to the requirement of the land for a public purpose and the decision not to apply section 5-A, in view of the urgency, can be taken simultaneously

The argument that the notification under section 4 (1) has no relation to any specified land but bears only upon a particular locality and that therefore it would be premature at that stage to arrive at any decision in relation to the applicability of section 5-A, would be untenable The absence of the word "particular" before the expression "land" in section 4 cannot lead to the inference that at the stage of the preliminary notification the Government has in view only a particular locality and not any specified piece of land. On the other hand, all the indications are that section 4 has reference to a specified bit of land

Appeals under clause 15 of the Letters Patent against the Orders of Ramakrishnan, J., dated 23rd October, 1964, and Srinivasan, J., dated 13th November, 1964, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petitions Nos. 1392 of 1962 and 1186 of 1962 presented under Article 226 of the Constitution of India to issue writs of *certiorari* calling for the records relating to the order, dated 12th October, 1962, in G.O. Ms. No. 3447, Home, on the file of the second respondent therein and quash the said order and made therein in so far

*W A. Nos. 34 of 965 and 352 of 1964. 1st July, 1965.

as it relates to the petitioner's portion in S. No. 60-B-1 and calling for the papers relating to the Gazette Notification G O R. No. 3414, Home, dated 21st August, 1962, issued under section 6 of the Land Acquisition Act and published in the *Fort St. George Gazette*, dated 29th August, 1962, at pages 1612-13 and to quash the same

V. Vedantachari and *N R. Chandran*, for Appellants.

Additional Government Pleader (*V. Ramaswami*), for Respondents.

The Judgment of the Court was delivered by

Chandra Reddy, C.J.—The subject-matter of challenge in this writ appeal is the notification, dated 21st August, 1962, issued under section 6 of the Land Acquisition Act (hereinafter called the Act). An extent of one acre 3½ cents in S. No. 50 (6) belonging to the appellants was notified for acquisition for the purpose of house-sites for Harijans under section 4 of the Land Acquisition Act. That notification also included a direction under section 17 (4) of the Act to dispense with the provisions of section 5-A of the Act in view of the urgency of the case. This was followed up by a declaration under section 6 of the Act. It was stated therein that possession of the land should be taken immediately after the publication of the notice under section 9 (1) of the Act. The appellants attacked these proceedings on various grounds, but they need not be set out here, as they have confined themselves in this appeal to one objection. The notification under section 6 of the Act is assailed on the ground that the prior notification under section 4 (1) of the Act was contrary to the relevant provisions of the Act, and this has affected the validity of the notification under section 6 They claim that at the stage when section 4 (1) notification is issued the question of acquisition is still in the investigatory stage and so the appropriate Government could not reach any conclusion as to the applicability of the urgency provisions contained in section 17 of the Act Though it will be open to the Government after considering all the matters relevant thereto to decide whether the acquisition should be proceeded with expeditiously, it would be premature to arrive at any opinion in relation to the applicability of section 5-A at the stage of section 4 (1) notification.

This argument is founded on the provisions of section 4 which commences with the words ·

"Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose . . . . "

The argument based upon the language that

"Land in any locality is needed or is likely to be needed for any public purpose",

is that the notification under the section has no relation to any specified land but bears only upon a particular locality and it is only after the preliminary investigation is carried out under that section that the land needed for a public purpose is particularised. Till the preliminaries are completed the appropriate Government does not reach any decision, as to the land to be selected for a public purpose. This result flows, according to the learned Counsel, from the difference in language between section 4 (1) and section 6 (1) which talks of 'any particular land is needed' for a public purpose Learned Counsel urges that if really a specified land was within the contemplation of section 4, it would have used the same language, namely, 'any particular land' as in section 6 The difference in the language in this behalf clearly indicates that at the stage of issue of notification under section 4 (1) the appropriate Government not having made up its mind as to the land to be acquired for a public purpose, it could not apply its mind to the question of the applicability of section 5-A of the Act, urges learned Counsel for the appellants. We are unable to accede to this contention.

Before we deal with the validity of this contention, it is useful to refer briefly to the scheme of the Land Acquisition Act, in so far as it has a bearing on this inquiry. The proceedings for acquistion start with a preliminary notification under section 4 (1), which recites that ·

"Land in any locality is needed or is likely to be needed for any public purpose "

After the notification, authority is conferred on an officer either generally or specifically by Government and on his servants and workmen to enter upon and survey and take levels of any land in such locality, to dig or bore into the sub-soil, to do all other acts necessary to find out whether the land is suitable for such purpose, to set out the boundaries of the land proposed to be taken and so on Section 5-A enables any person interested in any land which has been notified under section 4 to file objections to the Collector to the acquisition of the land or of any land in the locality as the case may be within thirty days of the issue of that notification. The Collector has to give an opportunity to the objector of being heard and after the objections are heard and after further enquiry if necessary, the Collector has to submit the case for the decision of the Government together with the record of the proceedings held by him and the report containing his recommendations on the objections. The decision of the Government on the objections is final. This is followed up by the declaration under section 6 that the land is needed for a public purpose. After such declaration has been made under section 6, the Collector has to take orders for acquisition of land It is manifest from the scheme noticed that as soon as a preliminary notification is issued under section 4, the officer authorised by the Government may enter upon the land to survey it and do all other necessary acts to ascertain whether the land is adapted for the purpose for which it was sought to be acquired and this action if taken would give sufficient notice to those interested to object. If objections are made, the Collector will consider those objections and make the necessary recommendations in his report to the Government. If, on the other hand, no objections are filed, the Government proceeds to issue a notification under section 6 on the report of the Collector.

To this usual procedure there is, however, an exception under section 17 contained in clause (4) of that section which recites :

" In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1) "

One thing is clear from section 17 (4) and that is that the direction contemplated by section 17 (4) should precede a declaration under section 6. There is nothing in the language of section 17 (4) to warrant the contention that the appropriate Government has to apply its mind to the problem bearing on section 5-A only after the issue of the preliminary notification. No such sequence is provided in that section. It does not prescribe that the appropriate Government should wait for the dispensing with the provisions of section 5-A till after the 4 (1) notification It is one thing to say that the appropriate Government is not under an obligation to include the direction for dispensing with the provisions of section 5-A in the preliminary notification, but a different thing to say that the Government is precluded from doing it.

On the other hand, we feel that the scheme of the Act indicates that the decision as to the requirement of the land for a public purpose and the decision not to apply the provisions of section 5-A in view of the urgency can be taken simultaneously. The authorities concerned need not wait for bringing into operation the provisions of section 17 (4) till after the issue of a preliminary notification.

This conclusion of ours is strengthened by the form of notification to be issued under section 4 of the Act which requires a schedule to be annexed mentioning district, taluk, village, description of land with survey or paimash numbers, name of the owner or occupier, boundaries of the land required to be taken up, all of which denote that section 4 has in contemplation a specified piece of land. The absence of the word 'particular' before the expression 'land' in section 4 cannot lead to the inference that at the stage of the preliminary notification the Government has in view only a particular locality and not any specified piece of land. On the other hand, all the indications in that section are that section 4 has reference to a specified bit of land It is true that after the notification under that section investigation is caused to be made by the officers authorised by the Government to ascertain the

adaptability of the land for a public purpose and it is only after being satisfied about the suitability thereof that the Government takes a decision on the question of the acquisition of the land and then makes a declaration under section 6 which becomes final It is too much to contend that the Legislature has invested the officers envisaged in sub-section (2) with enormous powers to decide as to which particular plot in a locality should be selected for a particular public purpose In our opinion, the purpose of the section seems to be that after taking a decision as to the requirement of a particular piece of land for a public purpose the appropriate Government authorises either specifically or generally one of their officers to carry out certain tests to ascertain the adaptability of the land and if it is found suitable issues a declaration under section 6. We are not persuaded that section 6 declaration could have relation to a land that is not the subject-matter of a preliminary notification It may be that a larger extent of land is indicated in section 4 notification than the land finally decided upon to be acquired , or it may be that after the notification the land may be abandoned if found to be unsuitable We have already stated that section 17 (4) of the Act does not require that the issue of a preliminary notification and the direction to dispense with the provisions of section 5-A should be in two stages. There can be a simultaneous decision in regard to both the matters

This conclusion of ours is reinforced by decided cases. In *Ramabrahmam* v. *State of Andhra*[1], a Division Bench of the Andhra Pradesh High Court has held that there is nothing illegal if the Government by the same order directs the officer concerned to issue the notification under section 4 and also to dispense with the procedure laid down under section 5-A of the Act. In the same trend of thought is the ruling of the Madhya Pradesh High Court in *Rambihari Misra* v. *State of M.P.*[2] It was decided in that case that it was within the competency of the Government to order that in any particular case coming under sub-section (1) of section 17, the provisions of section 5-A shall not apply in the preliminary notification under section 4.

Support is sought by Sri Vedantachari for the proposition advanced by him from a judgment of the Supreme Court in *Somavanti* v. *State of Punjab*[3]. The passage which is pressed into service in this behalf and occurring at page 822 is :

" If the Government, therefore, takes a decision to make such a notification and, thereafter takes two further decisions, that is, to dispense with compliance with the provisions of section 5-A and also to declare that the land comprised in the notification is in fact needed for a public purpose, there is no departure from any provision of the law even though the two notifications are published on the same day "

We are not convinced that these observations lend any colour to the conclusion of the learned Counsel. It is clear from the extracted sentences that the decision to make a notification under section 4 should be followed by two further decisions, namely, to dispense with compliance of the provisions of section 5-A and to make the declaration under section 6. It is significant that the expression used is 'take a decision to make a notification ' It does not talk of issuing a notification and then taking a decision. That the Supreme Court did not intend to lay down the proposition contended for by Sri Vedantachari is clear from the earlier passage in the same page :

" But it seems to us that where there is an emergency by reason of which the State Government directs under sub-section (4) of section 17 of the Act that the provisions of section 5-A need not be complied with, the whole matter, that is, the actual requirement of the land for a public purpose must necessarily have been considered at the earliest stage itself that is when it was decided that compliance with the provisions of section 5-A be dispensed with "

It is manifest from this sentence that the two decisions are parts of the same process, namely, acquisition of a particular piece of land and dispensing with the provisions of section 5-A.

It may be mentioned here that in the case under citation the direction not to apply the provisions of section 5-A was contained in the preliminary notifications under section 4 and that both the notifications under sections 4 and 6 were published simultaneously. Notwithstanding this, the objections of the owner of the

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1. (1957) 1 An.W.R. 21 : A.I.R. 1957 A.P. 450.
2. A.I.R. 1964 M.P. 111.
3. (1963) 2 S.C.R. 774 : (1963) 2 An.W.R. (S.C.) 18 : (1963) 2 M.L.J. (S.C.) 18 : (1963) 2 S.C.J. 35 : A.I.R. 1963 S.C. 151.

land were over-ruled. Thus *Somavanti* v. *State of Punjab*[1] far from lending any support to the case of the appellants militates against it.

Nor is *Nandeshwar Prasad* v. *U.P. Government*[2], of any avail to the learned Counsel. No where in the whole of the judgment has it been even suggested that the two things, namely, issue of preliminary notification and the direction contemplated in section 17 (4), should be done at different stages. In our opinion, neither the decided cases nor the language of the relevant provisions of the Act render any assistance or even colour to the contentions raised by the learned Counsel for the appellants. We feel that this argument is devoid of substance Even otherwise, we do not see how the appellants have been prejudiced by the inclusion of this direction in the preliminary notification. We fail to see how the decision not to apply the provisions of section 5-A taken sometime after the preliminary notification puts them in a better or more advantageous position. We are satisfied that the ground of attack is inadmissible and the writ appeal has to be dismissed with costs.

The judgment in Writ Appeal No. 34 of 1965 applies to Writ Appeal No. 352 of 1964 as the same point is raised therein. This appeal is also dismissed with costs.

V.K. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN

C. Lakmichand Mehta .. *Petitioner**

v.

B. Rajagopal Naidu and others .. *Respondents.*

Madras City Tenant's Protection Act (III of 1922), sections 7 and 11—Notice under—If necessary even in cases for recovery of arrears of rent—Termination of tenancy by notice under section 106, Transfer of Property Act —Tenancy governed by the City Tenants' Protection Act—Landlord—If could claim damages for use and occupation.

Transfer of Property Act (IV of 1882), section 106 (f) and Madras City Tenants' Protection Act (III of 1922), section 11—Mutual effects.

The provisions of section 106 (*f*) of the Transfer of Property Act relating to termination of tenancy by notice to quit, in its application to tenancies governed by the Madras City Tenants' Protecetion Act shall to the extent necessary to give effect to the provisions of the later Act, be deemed to have been repealed or modified. The provision of section 11 of the City Tenants' Protection Act regarding three months' notice will be attracted only to suits for eviction or application under section 41 of the Presidency Small Causes Courts Act for possession against tenants But where a landlord does not seek to evict the tenant but only claims damages for use and occupation on the basis of termination of tenancy in accordance with the provisions of the Transfer of Property Act, there is no provision of law barring him from claiming such damages for use and occupation. To such cases the notice required by section 11 of the Act is not necessary

Quaere :—(1) "Where a landlord purports to terminate the tenancy under the provisions of the Transfer of Property Act but does not take any proceedings for evicting the tenant can his claim to get possession be said to get barred on the expiry of twelve years from the period of such termination of tenancy ?

(2) "Where the tenancy is governed by the provisions of the Madras City Tenants' Protection Act can a landlord recover as damages for use and occupation anything more than the maximum rent that would be fixed under sections 7 and 7-A of the Act, merely because he has chosen to terminate the tenancy under the Transfer of Property Act.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of Small Causes, Madras, dated 26th August, 1963, and passed in N.T.A. Nos. 143 to 146 of 1963 against S.C S. Nos. 5645, 5643, 5646 and 5644 of 1962 respectively.

S. K. L. Ratan, for *K. C. Jacob, S.K.L. Ratan* and *M. X. Cardoza*, for Petitioner.

Respondents *ex parte*.

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1 (1963) 2 S C R. 774 (1963) 2 An W R (S C.) 18 : (1963) 2 M L J (S C.) 18 : (1963) 2 S.C J 35 : A.I R. 1963 S.C. 151

2 (1965) 1 S C J 90 · (1964) 3 S C.R. 425 : A I R 1964 S.C. 1217.

* C.R.P. Nos. 365 to 368 of 1964 8th April, 1966.

The Court made the ollowing

ORDER.—These revisions arise out of suits filed by the same plaintiff against four different tenants for arrears of rent and damages for use and occupation, in respect of portions of land in No. 57-L, Mount Road, Guindy, Madras It is the case of the plaintiff that he terminated the tenancy of the respective defendants by notice dated 26th October, 1961, expiring with 30th November, 1961 He had called upon the defendants to surrender vacant possession of the premises on the expiry of the tenancy and the notice contained the provision that in default the tenant would be liable to pay damages for use and occupation. The plaintiff claimed damages for use and occupation at Rs. 15 per mensem. In the suits, arrears of rent of Rs. 17-25 and damages Rs. 135, from each tenant for his occupation from 1st December, 1961, were claimed In defence, *inter alia*, the tenants set up rights under the Madras City Tenants Protection Act (III of 1922). It was pointed out that the landlord was in effect seeking to enhance the rent, and under the Act, the enhancement cannot exceed two annas in the rupee of the rent previously payable.

When the case was taken up for trial it is stated, learned Counsel for the plaintiff was prepared to argue the matter on the assumption that the tenants may be entitled to claim protection under the Madras City Tenants' Protection Act. He addressed arguments, assuming for the purpose of the case only that the City Tenants' Protection Act applied to the occupation of the plots in question by the respective tenants. But the plaintiff did not desire any definite finding by the Court in the matter on evidence which may preclude him from agitating the question over again, or at least be a stumbling block in re-agitating the question in future.

The first complaint by the petitioner before me, the landlord, is that, notwithstanding this reservation, the lower Court had gone into the question and given a finding that the tenants are entitled to protection under the City Tenants' Protection Act. A ground objecting to the finding in that form has been taken on the appeals to the New Trial Bench in the Court of Small Causes. The New Trial Bench proceeds to consider the case in the view that it has been admitted that the Act applied to the tenancies in question. The limited nature of the admission it is contended has not been noticed. Evidently, the distinction which is made by the learned Counsel for the plaintiff has been lost sight of as the distinction does not affect the disposal of the cases before the Court Learned Counsel for the plaintiff was willing to concede for the purposes of the suits, and for the determination of the claims made in the suits, that the City Tenants' Protection Act applied to the tenancies in question. But only he did not want a finding as already indicated which will be binding in all cases. Assuming that the City Tenants' Protection Act applied, the question posed and submitted by learned Counsel for the plaintiffs was that he would be entitled to claim damages for use and occupation, once he terminated the tenancy. Of course, the question can arise and may arise, whether it is open to him to terminate such a tenancy. That will be a question for determination. It is on this basis, that the learned Counsel it is stated, addressed arguments before the trial Court that section 11 has no application. It has no application, not in the sense that for the purposes of the suit the land need not be deemed to be one which is protected under the City Tenants' Protection Act, but in law it does not apply when there is no suit for eviction. Having gone through the papers and the submission of learned Counsel who appeared in the Court of first instance and made the concession with reservation, I accept the statement of the Counsel and hold that the Court need not have given a finding in regard to that question on evidence. The Court need not have examined the evidence relating to the same. The Court need have only proceeded with the further hearing of the suits on the concession made by Counsel for purposes of the particular suits. So far as the suits are concerned, it was immaterial whether the concession is made with a reservation, or not, as the concession would bind for all purposes in the suit.

The finding that the tenancies are governed by Madras Act III of 1922 as a finding on evidence is therefore discharged without prejudice to the respective claims

of the parties in other proceedings. But the concession stands and the matter is now considered on the basis of the concession limited to the present proceedings.

The learned Trial Judge is of the view that the notice terminating the tenancy with 30th November, 1961 is incompetent and of no effect since it is not in conformity with section 11 of the City Tenants' Protection Act. The learned Judge has failed to appreciate the provisions of section 11 of the Act. No doubt in its application the Transfer of Property Act shall to the extent necessary to give effect to the provisions of the Act be deemed to have been repealed or modified. The question is whether the provisions of section 11 are inconsistent with the determination of a lease under the provisions of the Transfer of Property Act.

Section 11 runs thus:

"No suits in ejectment or applications under section 41 of the Presidency Small Cause Courts Act 1882, shall be instiuttd or presented againt a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any, and stating the amount thereof"

If the present suits were suits for eviction, certainly the notices will be wholly invalid and the suits will get dismissed *in limine* The prohibition is against institution of suits in ejectment without notice in accordance with the provisions of section 11. The notice as provided therein is required and insisted upon only when the landlord seeks to evict the tenant and instituted a suit or makes an application under section 41 of the Presidency Small Cause Courts Act for the said purpose. The question which we have to consider is whether when a landlord, is not seeking to evict the tenant by suit he cannot terminate the lease by a notice in accordance with the provisions of the Transfer of Property Act. Of what use it may be to him is quite a different matter. The effect of it in one sense will be to compel him to file a suit for possession within 12 years of the termination of the lease by the notice. If any such suit is filed, it must be preceded by a notice in accordance with section 11. By not giving notice in accordance with section 11 and terminating the lease, the landlord only places himself in a dilemma that he cannot keep quite without filing a suit for eviction within 12 years and such a suit must be preceded by a notice in accordance with section 11. If he fails to file such a suit on the lapse of 12 years the landlord may be met by the plea of limitation. It must be seen that under the Act a tenant in relation to land includes a tenant who continues in possession of the land after the determination of the tenancy agreement. This therefore contemplates the applicability of the Act to cases of persons in possession of the land after determination of tenancy. In the present case, if the tenants are tenants under the Act, they will be continuing in possession after the determination of the tenancy agreements and they can claim benefits under sections 7-A, 9 and 11 amongst other rights recognised under the Act.

The next question for consideration is if they are not tenants under the Transfer of Property Act, is not the plaintiff, as owner, entitled to claim from them damages for use and occupation I see no provision of law barring him from claiming damages for use and occupation of the land from the erstwhile tenants, continuing in possession after the determination of tenancy. No doubt, as pleaded by the tenants, the question may arise as to the quantum of damages for use and occupation whether he can get round the limitation in section 7 of the Act. It may be that the landlord cannot claim more than what he could recover if the tenants had chosen to apply for fixation of fair rent under section 7 A of the Act, or the landlord had applied under section 7 of the Act for a tenant under the Act includes a person whose tenancy agreement has been determined. This aspect of the matter has not received any consideration from the trial Court. Then there is section 8 to be considered. The lower Court has in the view that the tenancies have not been validly terminated, given the finding that the plaintiff is not entitled to recover damages for use and occupation for any period As I have held that even if the Act applied to the tenancies in question, the leases as such could be validly terminated, though the landlord may not be able to seek eviction without a notice under section 11, the trial Court will have to entertain the cases over again and determine the damags for use and occu-

pation which the landlord may be entitled to. No doubt the Act makes no distinction between rent proper that is what is payable by a tenant under subsisting lease for occupation and the amount payable by the protected tenant under the Act whose lease might have been determined usually termed damages for use and occupation outside the Act—see sections 6 to 8 of the Act. The decrees of the Courts below are therefore set aside and the cases remitted to the Court of first instance for fresh disposal in the light of the observations made above. The respondents are unrepresented and there will be no order as to costs.

R.M. ——— *Revision set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K. S. VENKATARAMAN.

M. Kuppuswamy . *Appellant**

Criminal Procedure Code (V of 1898), sections 242 and 243—Procedure under—Accused questioned under section 242 denying offence—If could be convicted on a memo filed later admitting his guilt

The scheme of sections 242 to 245 of the Code of Criminal Procedure makes it clear that when the particulars of the offence are put to the accused under section 242 it is open to him to admit the offence under section 243 of the Code But if he does not admit the offence the Magistrate shall proceed to take evidence under section 244 of the Code and pass appropriate orders under section 245 There is no provision in the Code which contemplates the filing of a memorandum by the accused admitting his guilt after the initial stage under section 243 of the Code A conviction based on such a memorandum is not according to law and such procedure is not justified by the Code

Appeal against the Judgment of the VIII, Presidency Magistrate of the Court of Presidency Magistrates, George Town, Madras in C. Case No. 13640 of the Calendar for 1965.

S. R. Chandran and *M. A. Kermani*, for Appellant.

R. Santhanam for *S. Sheik Mohammed Ansari* (Advocate) on notice.

B. Sriramulu, for Public Prosecutor on behalf of State

The Court delivered the following

JUDGMENT.—This is an unfortunate case. The facts are these· The petitioner Kuppuswamy was charged by the Sub-Inspector of Police before the Eighth Presidency Magistrate, George Town, Madras, for an offence under section 4 (1) (*a*) of the Madras Prohibition Act, the allegation being that on 14th September, 1965, at about 16 hours at Kothawalchavadi, he was found in possession of a bottle containing 12 ounces of coloured alcohol and a small bottle containing 1 ounce of coloured alcohol without permit. On 15th September, 1965, the first day of hearing, when the copies of the records were furnished to him and he was questioned under section 242, Criminal Procedure Code (this being a summons case), he denied the offence. Consequently, summons were issued to the prosecution witnesses. The case was adjourned to 21st September, 1965. Since the witnesses were not ready, it was adjourned to 29th September, 1965. On that day the following is what happened according to the judgment of the learned Magistrate :

"To-day when the case is taken up for trial, the accused filed a memo admitting the offence The records produced by the prosecution do not indicate any bad antecedents about this accused Accused feels penitent for the offence and appeals for mercy Taking into consideration the repentance of the accused, I feel that the accused should be given a chance to reform himself Therefore, instead of sentencing the accused to any punishment, I order the release of the accused under section 3 of the Probation of Offenders Act, after due admonition"

The accused has filed this Criminal Revision and has filed an affidavit stating that he did not plead guilty at all, that a fraud was played upon him by an Advocate, Mr. Ansari whom he engaged and that the Advocate made him understand that the case against him had been dismissed and that he could go home after signing some paper he produced. Actually the memorandum is written in English, but signed by the accused in Tamil.

In view of the serious allegation made by the petitioner I called for a report from the learned Magistrate and also issued notice to Mr. Ansari. The Magistrate has sent a report, the relevant portion of which is :

*Cr.A.No. 231 of 1966. 29th April, 1966.

"On 29th September, 1965, Mr. Ansari, Advocate, filed a memo signed by the accused representing that the accused volunteered and pleaded guilty and pleaded for leniency The accused was questioned with reference to the memo signed by him and he accepted it The case was disposed of fater admonishing him under section 3 of the Probation of Offenders' Act"

Mr. Ansari has filed a detailed counter-affidavit denying that he played any fraud and stating that on 29th September, 1965, the accused came to him and wanted his help saying that he was going to plead guilty in the case. It was thereupon that he drafted the memo and the learned Magistrate also questioned the accused with reference to the contents of the memorandum and the accused pleaded guilty.

I accept the statement of the Magistrate that the accused was questioned with reference to the memo. signed by him and he accepted it as correct. This *prima facie* supports the version of Mr. Ansari but I do not think it necessary, for the disposal of the revision petition before me, to go further into the truth or falsity of the allegation made by the petitioner against Mr. Ansari. For the purpose of this revision petition, it is enough to observe that even accepting the statement of the learned Magistrate, there seems to be no provision in the Code to justify such a procedure. Section 242 says that when the accused appears before the Magistrate, the particulars of the offence shall be stated to him and that he should be asked if he has any cause to show why he should not be convicted. Under section 243, it is open to the accused to admit the offence. Section 244 says that if the accused does not admit the offence, the Magistrate shall proceed to hear the complainant if any and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take evidence in his defence. Section 245 says that if the Magistrate upon taking the evidence referred to in section 244 and such further evidence desired by the Magistrate and if he thinks fit, examining the accused, finds the accused not guilty, he shall record an order of acquittal. But if he finds him guilty he may pass sentence upon him according to law. Thus, there is no provision contemplating the filing of a memorandum by the accused admitting his guilt after the initial stage under section 243, Criminal Procedure Code. The decision of Somasundaram, J., in *Kadan Kunhikannan In re*[1], is distinguishable, because there the prosecution witnesses were examined as required by section 244, Criminal Procedure Code, and it was only when the accused was further questioned under section 245, Criminal Procedure Code, the admitted the offence and the learned Judge held that the Court was justified in accepting the prosecution evidence and acting on the admission of the accused at that stage. Sri Sreeramulu appearing for the learned Public Prosecutor is not able to cite any authority to justify the procedure which was adopted in this case. On this ground I set aside the conviction and sentence and direct the case to be re-tried by some other Magistrate.

R.M. *Order accordingly.*

1. (1957) 1 M.L.J. 151.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN

P. S. S. Somasundaram Chettiar and another .. *Appellants**

v.

C. T. Senthilnathan and two others .. *Respondents.*

Letters Patent (Madras)—Clause 15—Appeal under—If would lie in cases where a specific remedy is provided by statute—Decision of a single judge in a claim petition under Order 21, rule 58, Civil Procedure Code, (V of 1908)—If appealable under Clause 15 of Letters Patent

Civil Procedure Code (V of 1908), Order 21, rules 58 and 63—Order allowing a claim petition under—Remedy of the decree-holder—If could appeal under Clause 15 of Letters Patent (Madras) against the order.

The remedy of a decree-holder in cases where a claim or objection is allowed in execution in respect of any property attached by him is to institute a suit against the party in whose favour the claim has been allowed The statute expressly provides that subject to the result of the suit, if any, the order on the claim petition shall be final Hence a party aggrieved by an order on a claim petition has no right of appeal but can only file a suit to set aside the order

In view of the express provision in Order 21, rule 63, Civil Procedure Code, providing for a right of suit against an order on a claim petition under Order 21, rule 58, no appeal would lie under Clause 15 of the Letters Patent against the decision of a single judge of the High Court in a claim petition.

On appeal from the order and Judgment of the Honourable Mr. Justice Srinivasan, dated 15th March, 1963, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1918 of 1962 in E.P. No. 24 of 1960 in O.S. No. 6 of 1952-53 (District Court, Shimoga).

B. Kalyanasundaram, for Appellant.

K Kesava Ayyangar and E. A. Viswanathan, for Respondent No 1.

V. Meenakshisundaram, and *D. C. Krishnamurthy*, for Respondent No. 2.

The Judgment of the Court was delivered by

M. Anantanarayanan, O.C.J.—The main ground upon which we are now disposing of this Original Side Appeal can be very simply stated. In E P. No. 24 of 1960 in O S No. 6 of 1952-53 of the District Court, Shimoga, there was an application (No. 1918 of 1962) before Srinivasan, J., on the Original Side under Order 21, rule 58, Civil Procedure Code, for raising the attachment of certain properties, which was effected in execution of the decree. This application was preferred by One C.T. Senthilnathan, the claimant.

Naturally enough, the learned Judge (Srinivasan, J.) addressed himself to the main question whether the claimant was holding the property under the judgment-debtor, or for the benefit of another person, or whether he was holding it in his own *bona fide* right. The learned Judge was satisfied that the title *prima facie* and possession were with the applicant, in his own right and on his own account. The learned Judge, therefore, concluded that this property could not be validly attached and sold as the property of the judgment-debtor, liable to be proceeded against in execution of the decree. The learned Judge allowed the application and raised the attachment. The decree-holder has preferred this appeal from that judgment, under Clause 15 of the Letters Patent.

Even apart from the merits, Sri Kesava Ayyangar for the claimant-(respondent-1) advanced the argument that such an appeal could not be allowed. According to him it is not even maintainable. But he was content to press the argument in the form that, in any event, Order 21, rule 63, Civil Procedure Code, could not be negated in this fashion, by the decree-holder. That rule specifically lays it down that if the claim or objection is allowed, the party against whom such an order is made (decree-holder) has to institute a suit to establish the right which he claims to the property. " Subject to the result of such a suit, if any, the order shall be conclusive ", and the Legislature is explicit on this point. The argument, therefore, was

* O.S.A. No. 15 of 1964. 22nd June, 1966.

that we should not, merely because of Clause 15 of the Letters Patent, proceed into the merits of the controversy, and differ from the learned Judge (Srinivasan, J.) upon any conceivably different view of the facts. The affected party (decree-holder) has to be referred to the only remedy available to him in law, which is a remedy by way of suit.

It must be immediately stated that in certain early decisions of this Court, the matter has come up for discussion, and that a view has been expressed, no doubt with considerable hesitancy, which does not seem to be in accord with the subsequent explicit views of the Judicial Committee and of the Supreme Court It is sufficient for this purpose to refer to *Venugopal Mudali* v *Venkatasubbiah Chetty*[1], which noticed certain earlier decision of this Court also. The question arose in a different form in that case, because an appeal was actually entertained against the order on a claim petition passed by a single Judge of the High Court, and the Bench confirmed that order ; one argument advanced was that such a confirming judgment was without jurisdiction, in view of the explicit language or Order 21, rule 63, Civil Procedure Code. The learned Judges were exercised to come to a conclusion whether the general principle was that enunciated in Order 21, rule 63, Civil Procedure Code, and the specific provision of an exception was Clause 15 of the Letters Patent, or whether a reverse view should be taken. After noticing the prior authorities, such as *Sabapathy Chetty* v. *Narayanaswami Chetty*[2], and *Ravi Veeraghavulu* v. *Venkatanarasimha Naidu Bhadur*[3], Sadasiva Aiyar, J , expressed the view of the Division Bench with considerable hesitancy, that he thought that there was no warrant for interference with a long-standing practice, which was to allow such appeals, under the Letters Patent, or to reopen the question, when earlier decisions appeared to have sustained the point of view that such appeals could be maintained, notwithstanding the explicit terms of Order 21, rule 63, Civil Procedure Code. There the matter was permitted to rest, as far as this catena of decisions was concerned.

But susequently, the same principle came up for discussion, though in the context of other provisions of law, as part of the area of decision in the Privy Council Judgment in *Secretary of State* v. *H.C.I. Society*[4]. The Judicial Committee explicitly stated that, where there was such a provision for finality of decision specifically enacted by statute, it was intended to exclude any further appeal, and hence that it would prevail over some general provision as to appeals similar to that embodied in Clause 15 of the Letters Patent, the provision itself was not Clause 15 of the Letters Patent, but a distinct one.

Again, in the Supreme Court decision in *S. A. Industries (P.)* v. *Sarup Singh*[5], their Lordships had occasion to consider the same situation and principle, with reference to other facts. At page 1443 of the text there are explicit data to the effect that if a specific enactment makes an order of a single judge conclusive and final the appeal provided by the Letters Patent will not prevail over such a bar, it is only if there is no such bar, that the appeal lies under the Letters Patent *vide.* the observations in paragraphs 11 and 13 of the text, at pages 1446 and 1447 of the report.

In this view, therefore, we have no hesitation in coming to the conclusion that the earlier view expressed by the Division Bench of this Court, that we have referred to, and certain still earlier decisions noted in that judgment, may no longer be sustainable, or liable to be regarded as expressing the correct position in law. However, it is not necessary for us to proceed further in this direction, for the simple reason that we do not now have before us the situation of the canvassing of the legality or otherwise of a judgment given by a Division Bench, in appeal from a judgment of a single judge, which itself allowed or dismissed a claim under Order 21, rule 58 read with rule 63, Civil Procedure Code. It is sufficient for us to note that, in this appeal it is always open to us to dismiss the appeal, by referring the appellant to his true

1. (1915) 28 I C. 367
2. (1901) 11 M L J 340.
3. (1914) 25 I C 305.
4. L.R. 58 I.A. 259: 61 M.L.J. 864: A.I.R. 1931 P C. 149
5 (1966) 1 S C J 186 A I R. 1965 S.C. 1442 (1443) 1446 and 1447.

remedy at all and the exclusive remedy provided by the statute namely, the remedy by way of a separate suit. Accordingly, we refer the appellant to this remedy, and dismiss the appeal.

There would appear to be, no doubt, some difficulty about limitation, since the statute permits only one year from the date of order, for the institution of a suit. But that would depend on the further question whether the appellant could successfully claim that he has been *bona fide* pursuing another remedy in a Court, upon a misconception of his rights or of the processual law. Subject to satisfying the appropriate Court on this question of limitation, the appellant is referred to his remedy by way of a separate suit. This appeal is dismissed. The parties will bear their own costs.

R.M. —— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K.S. VENKATARAMAN.

D. A S. Swami .. *Petitioner**

v.

Kubendran .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 4 (1) (r) and 205 (1)—Pleader—If includes an agent—Agent when can plead

The definition of 'Pleader' under section 4 (1) (*r*) of the Criminal Procedure Code is an exhaustive one and refers only to an Advocate, Vakil or Attorney on the rolls of Advocates Any other person even if he be a lawyer, but not on the rolls of Advocates, who seeks to plead on behalf of an accused can do so only with the permission of the Court The reason behind the distinction is that while law yers who are qualified for the purpose and are subject to some discipline may be permitted to have a right of audience as a matter of course, persons who are not Advocates or Attorneys on the rolls of the Court, but purports to appear and plead as the power of attorney agent of the accused should get the permission of the Court The distinction is a reasonable one and does not violate Article 19 (1) (*f*) or (*g*) of the Constitution of India

Petition under sections 439 and 561-A of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Second Presidency Magistrate, dated 8th June, 1966, in C.C. No. 6481 of 1966.

Petitioner Party in person.

K. A Panchapagesan, for Public Prosecutor, for State.

The Court made the following

ORDER.—The facts giving rise to this Revision Petition filed under section 439, Criminal Procedure Code, by one D. A. S. Swami in his personal capacity are these. In C C. No. 6481 of 1966 on the file of the Second Presidency Magistrate, Madras, one Kuppuswamy *alias* Kubendran filed a Complaint against Kandaswami Mudaliar under sections 409 and 403, Indian Pencal Code. On 23rd April, 1966, he prayed for the issue of the summons to the accused for appearance on 30th April, 1966. On 30th April, 1966, one Sri T. R Venkataraman, a lawyer, entered appearance on behalf of the accused and prayed that the absence of the accused for that day might be excused on medical grounds. That was excused The case was adjourned to 9th May, 1966, and that day, being a holiday, it was adjourned again to 20th May, 1966. In the meantime the accused executed a power of attorney in favour of D.A S. Swami. It may be taken that thereby Sri T. R. Venkataraman was no longer appearing for the accused. The power of attorney is in the following terms:

"I hereby appoint my lawyer Mr D A S Swami, B A, B L, of 33 Habibullah Road, T Nagar, to represent me and to act on my behalf in C C No 6481 of 1966 and M P No 70 of 1966 on the file of the Second Presidency Magistrate, George Town, in addition to or in substitution for any Advocate engaged or to be engaged by him He is furthr authorised by me to apply under section 4 (1) (*r*) and section 540-A of the Criminal Procedure Code"

It may be mentioned at once that though in the power of attorney D. A. S. Swami is described as a lawyer and is a person holding a law degree, actually he is not on

* Crl R C No. 763 of 1966 and Crl. R. P. No. 747 of 1966. 29th June, 1966.

the rolls as a lawyer. It is necessary to mention this at the outset because there is a special definition of a 'Pleader' in section 4 (1) (r) of the Code of Criminal Procedure to the following effect:

"'Pleader' used with reference to any proceeding in any Court means a Pleader authorised under any law for the time being in force to practice in such Court, and includes an Advocate, a Vakil and an Attorney of a High Court so authorised and any other person appointed with the permission of the Court to act in such proceeding"

Since Swami was not an Advocate, a Vakil or an Attorney, he would not be a Pleader under the first sub-clause and would require the permission of the Court under sub-clause (2) to be a Pleader and act for the accused in the case.The power of attorneys eems to take note of this and that was why it mentioned section 4 (1) (r).

On 10th May, 1966, itself D. A. S. Swami presented two petitions; one petition in the name of the accused under section 4 (1) (r) was to this effect:

"It is prayed that the petitioner be permitted to appear through his lawyer Mr D A S Swami in whose favour he has executed a power of attorney for this purpose"

The other petition was under section 540-A, Criminal Procedure Code, to this effect:

"It is prayed that the personal attendance of the petitioner be dispensed with as a medica certificate has been already produced"

Both these petitions were signed by D. A. S. Swami styling himself as ".petitioner's agent". No orders were passed on the above petitions. Section 540-A may be quoted here:

"At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a Pleader dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused"

On 20th May, 1966, a further petition was presented in the name of the accused to this effect:

"It is prayed that the presence of the accused be dispensed with under section 540-A, Criminal procedure Code

This was also signed by D A S Swami as "petitioner's agent". The learned Magistrate passed an order which may be deciphered as "dispensed with". Some two petitions were filed on 27th May, 1966, and 30th May, 1966, but they were ordered to be called on 31st May, 1966.

On 31st May, 1966, the complainant's Counsel presented a petition to the following effect:

"The accused in the above case is not appearing before this Honourable Court and no power of attorney can represent the accused under section 205, Criminal Procedure Code Only an Advocate in whose behalf special vakalat is given by the accused can represent the accused and none else. It is prayed that this Honourable Court may be pleased to direct the accused to appear in this Honourable Court or by a duly authorised Advocate and reject the memo filed by the power of attorney holder"

Section 205 (1), Criminal Procedure Code, may be quoted here:

"Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendace of the accused and permit him to appear by his Pleader"

Upon the above petition, the learned Magistrate passed the following order on 8th June, 1966:

"Heard Unless the accused appoints and the Court permits one cannot come in as Pleader to represent the accused As such the accused is directed to appear and move for permission of Court to appoint his Pleader if necessary"

The present Revision Petition has been filed against the above order dated 8th June, 1966.

As stated already, this petition has been filed by D. A. S. Swami on his own behalf and not in the name of the accused. A question arises out of this straightaway whether D. A. S. Swami can claim a right of audience in this Court on behalf of

the accused in the case. On this, Clauses 9 and 10 of the Letters Patent of this Court make it clear that since D.A.S. Swami is not an Advocate on the rolls of this Court he cannot have a right of audience to represent the accused. The only exception to this Clauses 9 and 10 is that any suitor shall be allowed to appear, plead, or act on behalf of a co-suitor. But that exception does not apply here. These provisions have been interpreted by a Full Bench of this Court in *Thayarammal* v. *Kuppuswamy Naidu*[1], and this has been followed recently by a Bench of this Court in L.P.A. (S R.) No. 1363 of 1966. The Full Bench case points out the undesirable consequences which would ensue if a person other than a Lawyer is allowed to have a right of audience. A Lawyer who is qualified for the purposes is subject to some discipline but this cannot be successfully postulated of persons other than Lawyers. It is of some interest to note that in L.P.A. (S.R.) No. 1363 of 1966, the right of audience was refused to Sri D.A S Swami himself. But those decisions are in civil matters, and so far as the Criminal Procedure Code is concerned there is a special provision in section 4 (1) (*r*). Here again, as I have already pointed out, D.A.S. Swami cannot come in under the first clause he not being an Advocate, Vakil or an Attorney on the rolls of this Court, and in order to plead for the accused, he must get the permission of this Court. But D A.S. Swami does not seek any such permission from me and claims to have a right to plead for the accused without any such permission. Alternatively he says that he has a grievance in his individual capacity against the order dated 8th June, 1966, and that he is entitled to ventilate that grievance in his own right without any permission.

I shall take up the first part of his argument. His contention is that the definition of ' Pleader ' in section 4 (1) (*r*), Criminal Procedure Code, used only the word 'includes' and is, therefore, not an exhaustive definition and cannot bar a power of attorney agent like, himself. He points out that there are other sections in the Criminal Procedure Code and the Indian Penal Code using the word " agent of the accused", for instance, sections 172, 173 and 174 of the Indian Penal Code and Forms 12 and 13 of Schedule V to the Criminal Procedure Code. I am, however, unable to accept this contention. The definition of ' Pleader ' in section 4 (1) (*r*), Criminal Procedure Code, must be understood as an exhaustive definition, that is as saying " means and includes " To hold otherwise would mean that sub-clause (2) of the definition requiring the previous permission of the Court in the case of a person who is not an Advocate, a Vakil or an Attorney of a High Court, would become a dead letter. The context, therefore, clearly shows that the definition is an exhaustive one. It may be that for the other purposes contemplated in the provisions and Forms quoted by D.A.S. Swami, an agent may represent the accused without prior permission of the Court. But that cannot control the interpretation of the definition of ' Pleader ' in section 4 (1) (*r*), Criminal Procedure Code. It is also understandable that where a person other than an Advocate, Vakil or an Attorney is given the privilege of pleading for an accused, previous permission of the Court is necessary. Hence both as a matter of construction and on the probability of the matter, I have no difficulty in holding that the definition of ' Pleader ' in section 4 (1) (*r*) means that a person who is not an Advocate, Vakil or Attorney, requires the permission of the Court to become a Pleader as defined. Hence, the contention of D.A.S. Swami that he has a right to argue the case of the accused in this Criminal Revision Petition without such permission cannot be accepted.

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1 (1937) 2 M L J 552 : A I R. 1937 Mad 937 (F.B)

D.A. S. Swami contends that the above interpretation would interfere with the fundamental right of the accused to insist on anybody of his own choice, not necessarily a Lawyer representing him and arguing his case. D A.S. Swami urges that the accused might not have the means to engage a Lawyer and might find it cheaper to ask his son or some person like D.A.S. Swami to appear for him and that the requirement in section 4 (1) (*r*), Criminal Procedure Code, of the previous permission of the Court would be an unwarranted restriction on the right of the accused to acquire, hold and dispose of property within Article 19 (1) (*f*) of the Constitution. It seems to me that this argument is very far-fetched and that it will be straining the language to say that the requirement in section 4 (1) (*r*) of the previous permission of the Court to act for the accused in the case of a person other than an Advocate, a Vakil or an Attorney, is an interference with the fundamental rights of the accused under Article 19 (1) (*f*) of the Constitution. The definition is intended to regulate the procedure in a Criminal Court, and from that point of view it is quite reasonable for the Legislature to say that the permission of the Court is required in the case of a person other than an Advocate, a Vakil or an Attorney. Even if it should be considered as restrictive of the fundamental right under Article 19 (1) (*f*) it can be justified under Article 19 (5) of the Constitution as a reasonable restriction in the interests of the general public. Swami refers to the provision in Article 19 (6) of the Constitution which refers to sub-clause (*g*) of Article 19 (1), which says :

" All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business "

Article 19 (6) says :

" Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

(ii) ... . "

The argument is that D.A.S. Swami is carrying on the occupation of being a power of attorney agent of persons like the accused and that it will be competent for the State under Article 19 (6) to impose a reasonable restriction on the said right of D.A.S. Swami when he seeks to represent, plead and act for the accused in a criminal case and that because of the existence of such a power it is unnecessary to restrict the right of the accused to choose a person of his own choice to represent and plead for him. Now it seems to me that this very argument gives away the case of D.A.S. Swami and justifies the restriction in section 4 (1) (*r*) of the Criminal Procedure Code requiring the permission of the Court where a person other than an Advocate, a Vakil or an Attorney wants to act for the accused. It will be seen that in the above argument D.A.S. Swami concedes that it will be competent for the State to impose some technical qualification where the power of attorney agent wants to appear in Court and plead for an accused and it will be noted that the provision in section 4 (1) (*r*) concerns itself directly only with such a situation. It does not purport to affect the general right of a person like D. A. S. Swami to carry on the

occupation of being a power of attorney agent of others Section 4 (1) (*r*), Criminal Procedure Code, will come into play only where such a person seeks to act for the accused and plead for him.

It should be clear from the discussion so far that D. A. S. Swami has no *locus standi* to ventilate in this petition any grievance of the accused. It will be time enough to consider the situation if the accused himself should come forward with another criminal revision petition ventilating his own grievance.

I shall turn to the alternative limb of the argument of D. A. S. Swami that in this petition he is ventilating his own personal grievance. He urges that he has got a fundamental right under Article 19 (1) (*g*) to carry on the occupation of a power of attorney agent of persons like the accused and that the provision in section 4 (1) (*r*), Criminal Procedure Code, requiring him to seek the previous permission of the Court is violative of that fundamental right and must be struck down. I shall assume for the purpose of this argument without deciding it that the activity of D. A. S. Swami can be called 'carrying on an occupation' within the meaning of Article 19 (1) (*g*). As part of the occupation he wants to 'appear in a criminal Court and act for the accused by which he also means a right to plead for the accused. It seems to me that the restriction in section 4 (1) (*r*), Criminal Procedure Code requiring the previous permission of the Court is quite a reasonable restriction within, the meaning of Article 19 (6) of the Constitution. Article 19 (6) itself contemplates that it is open to the State to make a law relating to professional or technical qualification necessary for practising any profession, or carrying on any occupation, and section 4 (1) (*r*), Criminal Procedure Code, can be justified under this provision. The Court may in a given case permit even a person not qualified in law to plead for an accused and certainly the previous permission of the Court is only a minimum requirement and cannot be attacked as an unreasonable restriction on the supposed fundamental right of D. A S. Swami.

In the result, the petition is dismissed.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR JUSTICE P. KUNHAMED KUTTI.

C. R. Neelakantan and another .. *Appellant**

v.

C. Bakthavatsalam . *Respondent*

Civil Procedure Code (V of 1908), section 92—Suit under—Sanction of Advocate-General—Amendment of suit by addition of party—If requires fresh sanction

Where a suit has been properly instituted under section 92 of the Civil Procedure Code after obtaining the sanction of the Advocate-General, any amendment sought for in the suit subsequently by way of addition of party which is merely formal and does not alter the nature of the suit, does not require a further sanction of the Advocate-General

Where a suit has been originally instituted against the Secretary of a Charitable Trust registered under the Societies Registration Act, after obaining the requisite sanction under section 92 of the Code of Civil Procedure an application subsequently to implead the society itself as a party to the suit is maintainable and it does not require a fresh sanction from the Advocate-General.

K. Srinivasa Rao, for Appellant.

V. Ganapathisubramania Iyer, for Respondent.

The Court delivered the following

JUDGMENT.—This application by the plaintiff is to implead Saidapet Annadhana Samajam by its Secretary, C Bakthavatsalam as second defendant There is a connected application for consequential amendment of the cause title and

*C S No 54 of 1966 18th July, 1966.
Appln. No 1302 of 1966.

the several paragraphs of the plaint. That matter is not now before me as the said application is not stamped or numbered.

Applicants plaintiffs have filed the above suit for framing a scheme for safeguarding the properties of the aforesaid Samajam, and its income, for proper administration of the affairs of the Samajam, for removal of Bakthavatsalam from all posts which he claims to hold as, according to the plaintiffs, he has committed various acts of breach of trust, for appointment of a Commissioner-*cum*-Receiver to take inventory and for accounts, etc. The plaint is laid under section 92, Civil Procedure Code, and the Advocate-General has given consent to the institution of the suit as originally framed wherein C. Bakthavatsalam is impleaded as the sole defendant.

The averments in the plaint are to the effect that taking advantage of the factions within the Samajam, Bakthavatsalam has committed various acts of mismanagement and breaches of trust detrimental to the interests of the Samajam and has usurped for himself all the key posts of the Samajam. It is also alleged that subsequent to the order passed in I.A. No 2628 of 1962 in O S. No 2178 of 1962 (City Civil Court) that *status quo ante* should continue, he has altered several rules of the Samajam and effected changes in the personnel of the Committee to suit his own ends and that he had temporarily misappropriated the Government grant for teachers amounting to about Rs. 2,000 so that it is the plaintiff's case that the affairs of the Samajam are in a chaotic, deplorable and dangerous condition and that the funds of the Samajam are not utilised for the purpose for which they are intended.

Along with this plaint, the plaintiffs moved an application No. 806 of 1966 for appointing a Commissioner-*cum*-Receiver to take possession of the account books, and movable and immovable properties of the Samajam and administer the affairs of the Samajam. The said application is still pending In the counter filed by defendant Bakthavatsalam in the said application, he stated *inter alia* that the plaintiffs have no right to agitate for reliefs in respect of the affairs of the Samajam especially when the Samajam is not a party to the suit It is to obviate this objection, and for an effectual and complete adjudication of all questions involved in the suit and further to make the scheme framed and the orders made in the suit binding on the Samajam that the plaintiffs have now sought to implead the Samajam represented by its Secretary Bakthavatsalam, and the short point for consideration is whether this application is not maintainable in law and the applicants have no right to file the application.

Bakthavatsalam to whom notice was taken of this application, both in his individual capacity and as the Secretary of Saidapet Annadhana Samajam, has filed counter on his own behalf and on behalf of the Saidapet Annadhana Samajam. The substantial objection taken by him is that Saidapet Annadhana Samajam is a Society registered under the Societies Registration Act and the description of it as a public charitable institution is made with ulterior motives. He would contend that he has been sued in his individual capacity and sanction had been obtained from the Advocate-General in such capacity and, therefore, it is not open to the plaintiffs to say that the Saidapet Annadhana Samajam should be impleaded as a party for whatever purpose. He would further contend that the application is not maintainable according to the law governing bodies registered under the Societies Registration Act and the rules of the Samajam.

The suit is instituted, as I stated, under section 92, Civil Procedure Code with the consent of the Advocate-General. In the case of public charities, where any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute the suit for the reliefs set out in the said section.

Annadhana Samajam is a charitable trust registered under the Societies Registration Act (XXI of 1860) Section 6 of the said *Act prescribes* the mode in which suits by or against such Societies have to be brought. Every Society may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the Society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion· provided that it shall be competent for any person having a claim or demand against the society to sue the president or chairman, or principal secretary or the trutees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant, and section 7 provides that no suit or proceeding in any civil Court shall abate or discontinue by reason of the person, by or against whom such suit or proceedings shall have been brought or continued, dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceeding shall be continued in the name of or against the successor of such person. There are other provisions in this Act which enables the society to proceed against the members, who are in arrears, by suit as strangers and also for arrears of subscription or possession or detention of the property of the Society contrary to these rules, etc., or for otherwise being guilty of offences such as stealing, purloining, embezzling any money or other property etc. There are also provisions defining a member, providing for mode of dissolution and the effect of dissolution of societies that might be registered under the Act. But there is no provision in the Act which would justify the inference that a suit filed by or against a Society is not governed by section 92 Civil Procedure Code.

Sri Ganapathisubramaniam for the respondent, however, drew my attention to a ruling of this Court, reported in *Vara Prasad Rao* v *Gopalacharlu*[1]. Krishnan and Venkatasubba Rao, JJ , laid down in this case that objection as to absence of sanction under section 92 is not an objection that can be properly waived. What is emphasised by the learned Judges is the object of such sanction. That being to secure that suits are not brought against trustees unless there is a *prima facie* case against them of breach of trust or unless circumstances exist which necessitate the Court's interference in the administration of the trust. They also stated that the object of the section will be defeated it is left open to a plaintiff to get sanction against a peron who is not the trustee and then use it afterwards against the real trustee. The personality of the trustee and the way in which he is dealing with the trust are matters of material consideration in granting sanction for a suit. If we probe into the facts of this case, it would be seen that it has very little application to the present case where Sri Bakthavatsalam who is already on record as a defendant, no doubt, without any description of his capacity, as an intermeddler with the affairs of the Annadhana Samajam and against whom sanction has been granted by the Advocate-General is sought to be impleaded as representing the Annadhana Samajam which is sought to be added as supplemental second defendant.

Jessingbhai v. *Jivatlal*[2], is a case where a suit was instituted under section 92 against some defendant after obtaining sanction of the Advocate-General. Subsequently, the plaintiff amended the plaint by addition of one more defendant without such sanction. The Bombay High Court held that the amendment necessarily enlarged the scope of the suit and the suit thus being not identical with the suit which it was at the time of its commencement, was bad.

The present however is a case which to my mind, more appropriately comes within the scope and ambit of the ruling in *Selvam Mudaliar* v. *Raju Mudaliar*[3], wherein Rajamannar, C J., and Venkatarama Aiyar, J., held that a sanction given by the Advocate-General under section 92 is one generally for the institution of the suit for the removal of persons purporting to act as the trustees of a public religious institution and that an amendment sought for subsequently by way of addition

1. A.I.R. 1926 Mad. 970.
2. A.I.R. 1947 Bom. 487.
3. (1952) 2 M.L.J. 653 : A.I.R. 1953 Mad. 816.

of a party is merely formal and does not alter the nature of the suit. In such a case. a further sanction of the Advocate-General is not necessary.

I have already set out the material plaint allegations which necessitated the impleading of Bakthavatsalam as a person who was in charge of, and meddled with, the affairs and funds of the Samajam. The main relief in the plaint being the preservation and continuance of the Samajam as a charitable body after framing a scheme, it cannot be said that the Samajam represented by the present secretary who also is Bhaktavatsalam is not a necessary party to the suit for an effective adjudication of the controversy between the plaintiffs and Bhaktavatsalam as representing the Samajam.

This application is, therefore, allowed. The applicant may file a separate application for amendment of the plaint consequent upon this order.

R M. - ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT —MR M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE P. RAMAKRISHNAN.

The Management of Lakshmi Coffee Hotel, Kumbakonam .. *Appellant**

v.

The Workmen of Lakshmi Coffee Hotel, represented by the Kumbakonam Hotel Employees' Association, Bus Stand, Kumbakonam and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 2 (rr)—Wages—Free food supplied to workers in a hotel—If part of wagss

Whether the free food and tiffin supplied to workers in an establishment is part of their wages within the meaning of section 2 (*rr*) of the Industrial Disputes Act, 1947 is essentially a question of fact which had to be determined according to the circumstances of each case Where an employer pays the full compliment of wages to his workers, but as a matter of grace or concession supplies them with free food and tiffin during the hours of work, it can hardly be said that such supplies will form part of the wages even though they may be capable of being equated in terms of cash. But where the wages are only nominal and such a low or nominal wages could be explained only on the basis of the free food and tiffin supplied regularly to the workers, which was also reckoned with as part of the contract, the value of such food will be wages within the meaning of the section.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Kailasam dated 11th April, 1966, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1007 of 1966 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records, in I.D. No 46 of 1964 on the file of the Additional Labour Court, Madras, the 2nd Respondent therein and quash the award passed therein on 15th February, 1966.

A. Krishna Rao, for Appellant.

The Judgment of the Court was delivered by

Anantanarayanan, C.J—This appeal, which is sought to be instituted by the Management of a coffee hotel at Kumbakonam involves what is really an issue of fact, *viz.*, whether the free food and tiffin that has been supplied to the workers, by his establihment throughout can be taken into the computation of 'wages' within the meaning of section 2 (*rr*) of the Industrial Disputes Act (XIV of 1947). Section 2 (*rr*) defines 'wages' as

"all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment.. . . . .."

As the learned Judge (Kailasam, J.) has pointed out, the only issue is whether the free food and tiffin that has been supplied by the employer consistently to his employees in this hotel, would properly form part of 'wages' as defined. It appears

* W.A. No. 126 of 1966. 20th July, 1966.

to us that this is primarily a question of fact, for everything would depend on the circumstances. There may be a situation in which an employer is paying the full complement of wages to his employees, and is also giving free food and tiffin during hours of work, merely as a matter of concession or grace. In such a situation it could perhaps be argued that though the cost of the food and tiffin can be definitely calculated and, in that sense, the supply is certainly capable of being expressed in terms of cash, this does not form part of 'wages' because it is no part of the contract.

But, in the present case, the Tribunal has definitely found that the cash wages of each worker are, small, below the average, and that the prevalence of such a level can only be explained on the basis that the food and tiffin supplied is also to be reckoned with as part of the contract. The Tribunal remarks:

"The worker has to work and because he was working he was promised and given free food and tiffin. In my view, the very fact that for earned leave period he was given cash value of food ..is itself an indicator that it was accepted by all parties that supply of food was remuneration which was payable on terms under which the workers were employed"

The finding on this issue of fact being so specific and unambiguous, we have no doubt whatever that the learned Judge (Kailasam, J) was justified in holding that the cost or cash value of this supply formed part of the 'wages' as defined in the Act, under the circumstances of this particular case. The Writ Appeal has no merits and is dismissed.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Mani *alias* Balasubramaniam and others .. *Petitioners**

Criminal Procedure Code (*V of* 1898), *section* 195—*Procedure under—Applicability—Scope of.*

It is no doubt true that the provisions of section 195 of the Code of Criminal Procedure cannot be evaded by resort to devices or camouflage merely by changing the label of an offence, which essentially falls within its scope. Where an offence falls within the provisions of the section, it cannot be taken cognizance of unless it be at the instance of the concerned officer But it is equally settled that section 195 of the Code cannot bar the trial of an accused for distinct offences disclosed by the same facts which is not within the ambit of the said section.

Where the accused in violating a prohibitory order under section 144 of the Code forms an unlawful assembly and commits acts of trespass, theft and mischief to property, the accused could be prosecuted for such offences which are distinct from the offence of defying the prohibitory order, even though there is no complaint by the Magistrate as required by section 195 of the Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Special Sub-Divisional Magistrate (J.), Tiruchirappalli, dated 10th May, 1966 in C M.P. No. 10 of 1966 in C.C. No. 2 of 1966.

P. R. Gokulakrishnan, for Petitioners.

K. A. Panchapakesan for Public Prosecutor, for State.

The Court made the following

ORDER.—The twenty-six petitioners herein were charged by the Police before the learned Special Sub-Divisional Magistrate, Tiruchirappalli, for offences under sections 147, 148, 454, 454 read with section 149, 427, 435 and 435 read with section 149, Indian Penal Code. The main allegation against them was as follows .

"On 10th February, 1965 at about 11 A M at Jawahar Bazaar, Karur Town, the petitioners were members of an unlawful assembly, that in prosecution of the common objects of such assembly, *viz*, the resisting of the execution of law by defying the order passed under section 144, Criminal Procedure Code, in breaking open Kalyani Ready-made Stores belonging to Govindarajulu Pillai and causing mischief and mischief by fire, committed the offence of rioting, that at that time accused

* Crl R C No 768 of 1966 20th July, 1966.
(Crl R P No. 752 of 1966).

10 was armed with a crowbar and accused 7 and 21 with iron rods and that thereby accused 1 to 6,8,9, 11 to 20 and 22 to 26 committed an offence punishable under section 147, Indian Penal Code and that accused 7, 10 and 21 committed an offence punishable under section 148, Indian Penal Code".

After ten out of the 68 prosecution witnesses were examined, the petitioners filed an application before the Magistrate for dropping the proceedings on the ground that they were void for want of a complaint from the Deputy Tahsildar-Magistrate who had passed the prohibitory order under section 144, Criminal Procedure Code, prohibiting meetings and demonstrations for a period of fifteen days from 3rd February, 1965. The learned Magistrate overruled this objection. This revision case has been filed against that order.

Sri P. R. Gokulakrishnan, the learned Counsel for the petitioners, points out that the charge-sheet filed by the Police itself proceeds on the basis that the offences were committed in the course of defying the order passed under section 144, Criminal Procedure Code, and accordingly the defiance of that order would amount to an offence under section 188, Indian Penal Code, which could be taken cognizance of by the Court under section 195 (1) (*a*) of the Code of Criminal Procedure only on the complaint of the Deputy Tahsildar or some other superior officer. The learned Counsel urges that the other offences attributed to the petitioners are only incidental and that the provisions of section 195 (1) (*a*), Criminal Procedure Code, cannot be allowed to be evaded by omitting the offence under section 188, Indian Penal Code.

There are two decisions of the Supreme Court which lay down the principles to be observed in such cases. The first is *Basir-ul-Huq and others* v. *The State of West Bengal*[1], and the other is *Chandrika Sao* v. *State of Bihar*[2]. In the first case, the appellant Nurul Huda gave false information to the Police that one Dhirendra Nath had murdered his mother and he brought the Police to the cremation ground. The corpse was removed when it was found that the complaint was false. Thereupon, Dhirendra Nath filed a complaint against Nurul Huda and others under section 297, Indian Penal Code (trespass upon cremation ground) and section 500, Indian Penal Code (defamation). Nurul Huda and others objected that the proceedings were void because the offence under section 182, Indian Penal Code, had been committed in laying false information to the Police and the offence under section 182, Indian Penal Code, could be taken cognizance under section 193 (1) (*a*), Criminal Procedure Code, only on the complaint of the particular Police Officer. This contention was negatived. In respect of the offence under section 297, Indian Penal Code, it was pointed out that the offence was committed after the false information was given and was therefore a distinct offence. So far as the offence under section 500, Indian Penal Code, was concerned, it was recognised that it was contained in the very false complaint made to the Police. Nevertheless, it was held that the case under section 500, Indian Penal Code, could be taken cognizance of separately, though there was no complaint to the Police in respect of the offence under section 182, Indian Penal Code. The decision of the Full Bench of this Court in *Narayana Ayyar* v. *Veerappa Pillai*[3] was approved The first principle laid down was that section 195, Criminal Procedure Code, does not bar the trial of an accused for a distinct offence disclosed by the same facts and which is not included within the ambit of that section. The second principle was that the provisions of section 195, Criminal Procedure Code, could not be evaded by resorting to devices or camouflages. It was observed :

"The test whether there is evasion of section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the Court or of the public servant is required In other words, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian Penal Code, though

1 (1953) S C J 405 (1953) 1 M L J 775 : (1953) S C R 836 at 845 and 846.
2. (1963) M W N. (Crl) 49 at 52 and 53.
3. (1950) 2 M L J. 686. I L R. (1951) Mad. 661 (F.B.)

in truth and substance the offence falls in the category of sections mentioned in section 195, Criminal Procedure Code. Merely by changing the garb or label of an offence which is essentially an offence by the provisions of section 195 prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it"

In *Chandrika Sao* v. *State of Bihar*[1], the accused caused obstruction to the Assistant Superintendent of Commercial Taxes, when the latter wanted to take his books of accounts. This was an offence under section 26 (1) (*h*) of the Bihar Sales Tax Act, 1947. The accused also assaulted the officer and that was an offence under section 353, Indian Penal Code. The prosecution of the offence under section 26 (1) (*h*) of the Sales Tax Act required the previous sanction of the Commissioner of Commercial Taxes and no such sanction had been obtained and there was no complaint in respect of that offence. It was held that the conviction under section 353, Indian Penal Code, could stand. Their Lordships proceeded on the footing that the same act of the accused amounted to an offence under section 26 (1) (*h*) of the Sales Tax Act and also an offence under section 353, Indian Penal Code. They stated :

"He could be prosecuted for either or both these offences at the discretion of the prosecution It may be that he was not prosecuted in respect of both the offences and the prosecution was restricted to the offence under section 353, Indian Penal Code, only to obviate the necessity of obtaining the Commissioner's sanction Even so, the prosecution cannot be said to have done something which is unwarranted by law An offence under section 353, Indian Penal Code, is a graver offence than the offence under section 26 (1) (*h*) of the Act"

Reference may also be made to *Joghi Mahato* v. *Ananta Lal Ghosh*[2]. There, the accused along with some others had been restrained by a Magistrate by order under section 144, Criminal Procedure Code, from going upon a particular plot of land. They went to the land and did something further, with which the Magistrate's order had no concern, namely, they stole the crops of the complainant. It was held that the offence under section 379, Indian Penal Code, could be enquired into even though there was no complaint by the Magistrate for disobedience of the order under section 144, Criminal Procedure Code. At page 369 the following illustration is given :

"A man may be injuncted by a Police order under section 144 of the Code from going with five or six persons through the streets of Calcutta and if that order is violated by a body of hooligans and they commit mass murders, then in the interpretation that is now sought to be put upon Mr. Justice Sen's decision, the Magistrate would be precluded from going into the case of mass murder simply because of the violation of the order of the Commissioner of Police which is also an offence under section 188 of the Indian Penal Code The present case is a good illustration Theft has nothing to do with trespass. Even if there had been no order by the Magistrate under section 188 of the Indian Penal Code the offence would still be theft in the present case for taking away the complainant's crop if the facts are proved"

Sri K. A. Panchapakesan has referred also to some other decisions, namely, *Chandra Rao* v. *Sambayya*[3], *Kashi Nath Pathak* v. *Kitu Rajwar*[4], and the decision of Sadasivam, J., in Cr.M.P. No. 799 of 1965.

Sri P. R. Gokulakrishnan has, for his part, relied on the following decisions : *Ramswarup* v. *The State*[5], *Magandhai* v. *State of M.P.*[6], *Makaradhwaj Shahu* v. *The State*[7], and In re *V. V. L. Narasimhamurthy*[8].

I am clearly of the opinion that the circumstances of the present case bring it within the ambit of the decisions cited by Sri K. A Panchapakesan and that the decisions cited by Sri P. R. Gokulakrishnan are distinguishable. The offences under sections 147, 148, 454, 427 and 435, Indian Penal Code, are distinct offences from the alleged violation of the prohibitory order. In fact, I doubt whether there was any violation of the prohibitory order to constitute an offence under section 188, Indian Penal Code Even on the footing that an offence under sction 188, Indian Penal Code, had been committed, the want of complaint by the Tahsildar relating to that would not bar the Magistrate from taking cognizance of the other offences.

1. 1963 M W N. (Crl) 49
2 I L R (1951) 2 Cal 367.
3. A I R 1958 A P 718.
4. A I R. 1964 Cal 436.
5. A.I R. 1952 Assam 68.
6 A I R 1953 Nag 290
7 A I R 1954 Nag 290
8 (1954) 1 M L J. 650 A I R. 1955 Mad. 237.

which are distinct and separate offences, and in fact graver offences. Those offences could stand independently, whether there had been an order under section 144, Criminal Procedure Code, or not. There is no attempt by the prosecution to circumvent the provisions of section 195 (1) (*a*) of the Code of Criminal Procedure. Accordingly, the revision case is dismissed.

R.M. — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

G. A. Rajaram .. *Petitioner**

v.

R. Anantaram and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10—Adding party—Scope of

The provisions of Order 1, rule 10 are capable of both a narrower and a wider interpretation. While a necessary party (*i e*) a party without whom a legal decree cannot be passed in the suit, has every right to get impleaded, even a proper party may in certain circumstances seek such a relief The Court must primarily consider whether the presence of the proposed party would advance the total and satisfactory adjudication of the subject-matter in controversy In such cases the Court has a wider discretion to implead a party if it considers the presence of such a party essential or even desirable in the interests of justice

In a suit for dissolution of partnership and accounts in which one of the partners is the head of a Hindu joint family, the son of such a partner may be impleaded as a party in that suit He will, however, not be able to get any right *inter se* between him and his father adjudicated in that suit but he can be impleaded so as to enable him to protect the interests of the family assets

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Madurai, dated 23rd November, 1964 and made in I A No. 419 of 1964 in O S. No. 121 of 1963.

A. Sundaram Iyer, for Petitioner.

M. R. Rajagopalachari and *A. Sundaresan*, for 1st Respondent.

K. Parasurama Iyer, for Respondents 2 to 4.

The Court made the following

ORDER.—This revision proceeding involves a question of some interest on the precise principle of Order 1, rule 10, Civil Procedure Code, in the context of a suit for dissolution of partnership and accounts, as between partners, in which one partner is the head of a Hindu joint family including the son. It is the son of the partner (plaintiff) who now prays that he may be formally impleaded in the suit, on the principle of Order 1, rule 10, Civil Procedure Code, as a proper party even if he is not a necessary party and permitted to be in touch as a party on record with the course of the litigation.

Curiously enought the other partners who are strangers do not object to this prayer of the son. They maintain a strictly neutral attitude and as the suit has hardly begun their learned Counsel represents that they are not substantially affected by the order one way or the other. Even if the son is impleaded and he files a written statement, they are concerned only with the rights in the partnership business as between themselves and the other partner, namely, the plaintiff. It is the father (plaintiff) who strongly objects to the impleading of the son as a party to the suit, apparently on the ground of some illwill between himself and his son.

Certain aspects of the law which have relevance to facts of this kind will be found discussed in a Bench decision of Varadachariar and Pandrang Row, JJ., in *Venkataramana* v. *Varahalu*[1]. As the Division Bench pointed out, the principle of the Full Bench in *Gangayya* v. *Venkataramiah*[2] is that a person in the position of a plaintiff cannot maintain a suit for dissolution of a partnership in which the managing member

* C R P No 343 of 1965. 29th July, 1966.

1. (1940) 50 L.W. 681.

2. 34 M.L.J. 271 : I.L.R. 41 Mad. 454 (F.B.).

of his family was a partner. But where on dissolution, a managing member partner has entered into an arrangement prejudicial to the interests of his family, the junior coparceners are not without a remedy. Equally, when the managing member has placed himself in an embarrassing position in respect of the assertion or protection of the rights of his family, the junior members are not without a remedy. They can maintain the suit, not merely against their manager, but also against the persons who are in possession of their share of the assets.

In the present case I think that the Court below has taken too strict and narrow a view of the scope or Order 1, rule 10, Civil Procedure Code, practically limiting the interpretation of the rule to the words 'necessary party'. Actually, the rule involves both a narrower scope and wider scope, and while a necessary party, that is, a party without whom a legal decree cannot be passed in a suit, has every right to be included, even a 'proper' party can press for such a relief. The Court must primarily consider whether the presence of that party would advance the total and satisfactory adjudication of the *lis* or the subject-matter of controversy. If the presence of such a party would be essential or highly desirable in the interests of justice, the Court has a wide discretion to implead such a party also. In the present case, as I have observed earlier, the other partners (defendants) do not objecs to the impleading of the son. Even the objection of the father (plaintiff) is nebulous and vague and seems to be based more on an apprehension arising from hostility than anything else. I must make it clear that the impleading of the son as a party does not mean that he can get any right adjudicated by a decree in this suit *inter se* between himself and his father. It is conceded that this is outside the ambit of the suit and that he may have to file a separate suit for such purpose. But he has to safeguard the interests of the family by seeing that his father (plaintiff) does not compromise the suit to the disadvantage of the family or in such a manner as to whittle down the family asset. In this sense he is a proper party and his presence on record will not impede the suit in any way as he claims no separate right or relief. I accordingly direct that the revision be allowed and the son (revision petitioner) be immediately impleaded as a party to the suit, and directed to file a written statement forthwith. The suit should thereafter proceed to expeditious trial. No costs.

R.M. — *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

The Management of Express Newspapers, Ltd., Madras-2 .. *Petitioner**

v.

The Additional Commissioner for Workmen's Compensation, Madras and another .. *Respondents.*

*Industrial Disputes Act (XIV of 1947), section 2 (oo)—" Retrenchment "—What is—*Bona fide *retrenchment of surplus staff—When could be interfered with by tribunal*

It is now well settled that if a person has a right to carry on his business he has an equal right to decide not to carry on his business if he so chooses No management can be compelled to retain an employee when his services are not useful to the management and they have a right to retrench his services Retrenchment is discharge of surplus labour for any reason otherwise than as a punishment and it cannot apply to a case of *bona fide* closure of business.

Where an employer re-organises his business for reasons of economy or under a *bona fide* scheme of re-organisation introduced in all areas of his business the fact that its implementation will result in retrenchment of some worker will have no material bearing on the question whether the re-organisation was adopted *bona fide*. It is no doubt true that the form of the order by which the workmen's services were terminated would not be decisive of the question and an Industrial Court or tribunal would be entitled to examine the substance of the matter and decide whether the termination was a discharge simpliciter or whether it was a dismissal under the cloak of retrenchment.

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* W.P. No 915 of 1963. 5th September, 1966.

Where there was a general strike in an establishment and there has been a complete closure of the same, the fact that the management carried on the work with a skeleton staff to collect the outstandings due, cannot mean that they have no right to effect a re-organisation in their skeleton staff The fact that the services of a surplus hand among the skeleton staff was retrenched cannot lead to any inference that the retrenchment was not *bona fide*, especially in the background of the history of the establishment.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records in M S E. Appeal No. 6 of 1963 on the file of the 1st respondent and quash the order dated 24th May, 1963 and made therein.

R Narayanaswami, for Petitioner.

The Government Pleader, on behalf of Respondent No. 1.

N. G. R. Prasad, for Respondent No. 2.

The Court made the following

ORDER.—The Management of Express Newspapers, Limited have filed this petition under Article 226 of the Constitution of India to quash the order of the Additional Commissioner for Workmen's Compensation, Madras (first respondent) dated 24th May, 1963 setting aside the order of termination of the services of M. Neelakantan (the second respondent) passed by the Management on 7th December, 1962.

The facts leading to this petition lie in a narrow compass. In 1959, there was a strike in the Madras office of the Newpaper. Thereupon, the Management declared a closure of their business, and also paid the staff their dues upto that date. The second respondent who was an employee of the Newspaper office was one among them. Sometime thereafter, the second respondent volunteered his services and the Management then entertained him as a temporary employee to assist the skeleton staff which was then functioning. According to the affidavit filed in support of the writ petition, the second respondent was continued in various departments of the Office to assist the staff in collecting the outstandings due to the Newspaper office and that when the Management had to effect a re-organisation even in respect of the skeleton staff, they had to retrench the second respondent from service as he happened to be the juniormost among the temporary staff. Of course, it is in the records that the Management were not satisfied with the work and conduct of the second respondent. On termination, the second respondent was paid one month's salary in lieu of notice, besides the retrenchment compensation he was entitled to under the law. Thereupon, the second respondent filed an appeal before the Additional Commissioner for Workmen's Compensation under section 41 (2) of the Madras Shops and Establishments Act. The Commissioner set aside the order of termination of the second respondent by the petitioner, as he was of the view that the services of the second respondent were not terminated for a reasonable cause. While setting aside the order of termination, the Commissioner observed that the various allegations of misconduct made against the second respondent would show that the actual reason behind the termination was certain alleged misconduct and not that he was being found surplus to the requirement. It is this order of the Commissioner that is attacked by the Management in this Writ Petition.

The only question for consideration in this Writ Petition therefore is whether the termination of the services of the second respondent was termination simpliciter or dismissal under cloak of discharge simpliciter.

Before deciding that point, it is pertinent to note the observations of Rajamannar, *Chief Justice* in *Indian Metal and Metallurgical Corporation* v. *Industrial Tribunal*[1].

1. (1952) 1 M.L.J. 481 at 486.

"If a citizen has got a right to carry on business, we think it follows that, he must be at liberty not to carry it on if he so chooses A person can no more be compelled to carry on a business than a person can be compelled to acquire property Mr Bhashyam was really unable to convince us how any one can be compelled to carry on a business against his will and yet be said to enjoy a right to carry on a business"

In the present case, there was strike followed by a closure and the management were maintaining a skeleton staff to collect the outstandings and to look after the pending matters. The employee who volunteered his services was taken on a temporary basis. There is no doubt the fact that the management were not pleased with his work and conduct. They transferred him from one section to another, and finally when he was found a surplus he was discharged. Certainly, the management cannot be compelled to retain or maintain an employee, when that person is not useful to the management. Retrenchment is termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. It means, as observed by their Lordships of the Supreme Court in *Hariprasad* v. *A. D. Divelkar*[1], the discharge of surplus labour or staff by the employer for any reasons whatsoever otherwise than as a punishment inflicted by way of disciplinary action and it has no application where the services of all workmen have been terminated by the employer on a real and *bona fide* closure of business. In *Macropollo & Co.* v. *Their Employees' Union*[2], their Lordships of the Supreme Court had to consider a case of retrenchment consequent upon re-organisation of business for reasons of economy. They have observed that if re-organised scheme has been adopted by the employer for reasons of economy, and convenience and it has been introduced in all the areas of its business, the fact that its implementation would lead to the discharge of some of the employees would have no material bearing on the question as to whether the re-organisation scheme was adopted by the employer *bona fide* or not and that the resulting discharge and retrenchment would have to be considered as an inevitable, though very unfortunate, consequence of the reorganised scheme which the employer, acting *bona fide* was entitled to adopt. In the case cited also the respondents contended that there was victimization and unfair labour practice. In *Tata Oil Mills Co., Ltd.* v. *Their Workmen*[3] the Company lost their confidence in a particular salesman and therefore terminated his services The Company contended that the termination was discharge simpliciter but the workmen contended that it amounted to dismissal. Their Lordships observed that where an order of discharge made by an employer gave rise to an industrial dispute, the form of the order by which the workmen's services were terminated would not be decisive and Industrial Court would be entitled to examine the substance of the matter and decide whether the termination was in fact discharge simpliciter, or whether it amounted to dismissal which had put on the cloak of a discharge simpliciter, and that if the Industrial Court was satisfied that the order of discharge was punitive, that it was *mala fide*, or that it amounted to victimisation or unfair labour practice, it was competent to the Industrial Court to set aside the order and in a proper case direct reinstatement of the workman, and that the test always was whether the act of the employer was *bona fide* or not.

In the instant case, the Commissioner, after referring to the counter-statement of the management, wherein they had mentioned about the unsatisfactory work and conduct of the second respondent, concluded that the petitioner did not establish by any evidence that the second respondent was found to be surplus to the requirements. From the records, it will be seen that the Management had not only set out the record and conduct of the second respondent but also the service conditions of the employee. It is common case that there was a general strike in the office of the Newspaper. The strike was followed by the closure of the establishment itself. Sometime thereafter, the second respondent was taken in as a temporary employee to collect the outstandings due to the office in the various departments. When the Management wanted to effect a re-organisation even in respect of the skeleton staff and when the second respondent was found to be a supernumerary

1. 1957 S C 83. A I R. 1957 S C 121 at 132.
2. (1958) 2 L L J. 492 : A.I R. 1958 S C. 1012.
3. (1963-64) 24 F.J R. 472.

to their requirements, they terminated his services as he happened to be the junior-most person. On these facts, I am unable to say that the order of discharge is punitive or that it is *mala fide*. The second respondent has not established that he was actually not a surplus and the retrenchment effected was a cloak to get rid of him. May be the Management were not pleased with his work and conduct. But in the face of patent facts, we cannot make an inference as to the reason behind the termination, as has been done by the tribunal below. In the instant case, I am satisfied that the termination was, in fact, discharge simpliciter.

In the result, the order of the Additional Commissioner for Workmen's Compensation dated 24th May, 1963 setting aside the order of termination of the services of the second respondent is hereby quashed. The petition is allowed, but, in the circumstances, without costs.

R.M. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE T. VENKATADRI.

R. Venkataramani .. *Petitioner**

v.

The Madras Hindu Religious and Charitable Endowments Board, represented by its Commissioner .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951)—*Scheme framed under ignoring the rights of a hereditary trustee—If binding on such trustee*

It is now well settled that the office of hereditary trusteeship is 'property' which can descend to the heirs of such trustees. Any scheme framed by the Board which does not make provision for the management of the temple by the hereditary trustee and reduces them to the position of dummies, cannot be binding on such trustee.

But where the Board framed a scheme after removing the hereditary trustee for acts of mismanagement, the scheme would be valid and it is not open to such a trustee to attack its validity by way of a writ under Article 226 of the Constitution Even if he establishes a *prima facie* case that he is the hereditary trustee, his only remedy will be to take appropriate proceedings to safeguard his rights.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of prohibition, restraining the respondents herein from enforcing against the petitioner the provisions of the scheme Exhibit F. issued by the Madras Hindu Religious and Charitable Endowments Board as confirmed by its order dated 2nd December, 1965 particularly or to exercise of the powers of management of Sri Krishnaswami Kasivaradarajaswami and Prasanna Venkateswaraswami temples by the respondents or through their agents.

S. Chellaswamy, M. R. Krishna Iyer and *I. M. Govindan*, for Petitioners.

The Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—These writ petitions are filed by one Venkataramani claiming to be the hereditary trustee of three temples, namely, Sri Krishnaswami, Kari Varadarajaswami and Prasanna Venkateswaraswami, situate in the village of West Komaralingam, Udumalpet Taluk, to quash the scheme framed in respect of the management of these temples in O.A. No. 98 of 1955 by the Hindu Religious Endowments Board and to prohibit the Commissioner of the Board from enforcing the said scheme.

Before I dispose of these writ petitions it is necessary for me to state briefly the facts that led to the filing of these writ petitions. The petitioner is the son of

* W P. Nos 735 and 736 of 1963. 7th September, 1966.

one K. S. Ramaswami Ayyangar who claimed to be the hereditary trustee of the abovesaid temples. He alleges that the temple was founded and established by his ancestors 155 years ago. A grant in respect of the temple was made by the Ruler of Mysore and with regard to the Kari Varadarajaswami temple the grant was made by the Palayakars of Madurai. The petitioner's ancestors have been in possession and enjoyment of the properties attached to the temple. A patta for the properties was issued in the name of his great-grandfather, Narayana Ayyangar, after him to his son and grandson, the grandfather of the petitioner who died in 1951 and thereafter the hereditary trusteeship descended to the petitioner's father and he continued to be the trustee till he was removed by the Endowments Board for mismanagement of the temples. Owing to the mismanagement of the temples, scheme proceedings were started under section 58 of Madras Act XIX of 1951 in O.A. No. 98 of 1955 and notice was given to the petitioner's father on 26th March, 1955. He filed his objections on 20th September, 1955 and after an enquiry the Deputy Commissioner, Hindu Religious and Charitable Endowments Board, Coimbatore, framed a scheme by his order dated 2nd December, 1955. Simultaneously charges were framed against the petitioner's father under section 45 of the Act and after following the procedure prescribed by the Act the Deputy Commissioner by his order dated 18th December, 1955 removed him from the office of trustee of the temples.

Then the petitioner's father started a series of proceedings only with the intention of preventing the implementation of the scheme framed by the Board and depriving him of the possession of the properties belonging to the temple. He filed O.S No. 6 of 1956 on the file of the Sub-Court, Coimbatore, for a declaration that the properties of the temple are his absolute properties only burdened with service or in the alternative to declare that he is the hereditary archaka of the temple entitled to the management of the temples and possession of the properties. In that suit one of the important issues framed was "Whether the plaintiff is a hereditary archaka-trustee of the temple?" The learned trial Judge gave a finding to the following effect :

> "Plaintiff's forefathers and the plaintiff have been the hereditary archaka-trustees of the temple. It was on this ground that the temple was declared as an excepted temple in 1941."

Evidently, the reference is to the Board's order dated 7th November, 1941, wherein it was observed :

> " . the petitioner and his ancestors had been managing the temples as trustees and that therefore the temples are excepted temples as defined in Madras Act II of 1927"

Nevertheless, the suit was dismissed on the ground that the properties really belonged to the temples and therefore the plaintiff cannot claim to be in possession of the same. Against that decree he preferred A.S. No. 240 of 1958. The only question raised before Kailasam, J., was whether the properties in suit belonged to the plaintiff absolutely only burdened with service. The learned Judge negatived this contention and came to the conclusion that the grant was not a personal inam to the plaintiff but that the properties did really belong to the temples. Hence he dismissed the appeal. Thereupon the plaintiff filed L.P.A. No. 110 of 1961 and the Bench consisting of Ramachandra Iyer, C.J, and Anantanarayanan, J., confirmed the finding of Kailasam, J., and dismissed the appeal on 23rd October, 1962. Soon after the dismissal of that appeal the petitioner rushed to this Court with the above two writ petitions for the reliefs mentioned above. The main ground urged by the petitioner is that his rights as a hereditary trustee is not affected and that in the scheme framed by the Endowments Board no provision has been made for the management or possession of the temple properties and that therefore the scheme is not binding upon him. But this contention is met by the learned Counsel appearing for the State that it has not been declared that the petitioner is not a hereditary trustee, that no order has been passed against him and hence he is not an aggrieved party and that the scheme will be and would be valid at the time of its framing, since the petitioner's father had been removed from the trusteeship on account of his mismanagement of the properties.

Therefore, the only question that has to be considered by me in this case is whether the scheme would be binding on the petitioner. It has been held in *Narayanan Nambudripad* v. *State of Madras*[1]:

"The nature and incidents of the office of hereditary trusteeship are well settled by authority. It descends like partible property on the heirs of the trustees Even females will be entitled to the office if they happen to succeed as heirs."

In *Sankaran Nair* v. *Govindan Nambiar*[2], Balakrishna Ayyar, J., held that hereditary trusteeship is property within the meaning of Article 19 (1) (*f*) of the Constitution and if there is an encroachment of the rights of citizens as hereditary trustees to manage a temple, they can be granted appropriate relief and that where a scheme framed by the Hindu Religious Endowments Board and modified by the District Court reduces the herediary trustees to the position of dummies, the provisions of such a scheme are void under Article 19 (1) (*f*) of the Constitution. Therefore, it is clear from the principles laid down by these decisions that if the petitioner is a hereditary trustee and if there is no provision in the scheme sought to be enforced for the management of the temples, he (petitioner) has got every right to say that the scheme would not be binding on him.

But then the question would arise whether the petitioner has established that he is a hereditary trustee in respect of these temples. Learned Counsel for the State contended before me that the petitioner has not established that he is a hereditary trustee and that it is for him to establish such a right by taking appropriate proceedings under the Hindu Religious and Charitable Endowments Act and that as long as he did not get such a declaration, he has no right in these writ petitions to question the propriety of the scheme framed by the Board in 1955 It is therefore necessary for me to consider whether there is any material placed before me for holding that the petitioner has *prima facie* made out that he is a hereditary trustee of these temples. As early as in the year 1941, when an application under section 84 of Madras Act II of 1927 was filed for a declaration that the temples are excepted temples, the Commissioner of the Endowments Board gave a finding that since the petitioner therein (Sami Ayyangar) and his ancestor had been managing the temples as trustees, the temples are excepted temples as defined in Madras Act II of 1927. Similarly, when the petitioner's father filed the suit O.S. No 6 of 1956 and an issue was framed whether he is the hereditary archaka-trustee of the temple, the finding was that "plaintiff's forefathers and the plaintiff have been the hereditary archaka-trustees of the temple." But what the learned Counsel for the State contended before me is that this finding was unnecessary for the disposal of the suit because the question that was concerned in that suit was whether the suit temples were excepted temples or not. But the learned Counsel for the petitioner brought to my notice the decision in *Munuswami Mudali* v. *Kanniah Naidu*[3], where Chandra Reddi, J., (as he then was) observed:

". the decision of the Board that the temple was an 'excepted' one could only be based either on the finding that the trusteeship of these institutions was hereditary or that the rule of succession was provided for for that office."

Therefore, on the materials placed before me, it looks as if the petitioner has *prima facie* established that he is the hereditary trustee in respect of these temples. But the question that would still remain to be considered is whether the petitioner is entitled to ask for the quashing of the scheme framed by the Board when his father was removed from trusteeship on account of his mismanagement. At the time when the scheme was framed, the Board had got jurisdiction to frame it. An Executive Officer was appointed to take possession of the temples and their properties. The petitioner cannot now in these proceedings question the validity of the said scheme. It is for him to take appropriate proceedings to protect his rights and therefore as long as the scheme was valid at the time when it was framed by the Board, the petitioner cannot attack the same in these proceedings. Of course, the scheme as it is may not bind him. With these observations, these writ petitions are dismissed. No order as to costs.

R.M. — *Petitions dismissed.*

1. (1953) 2 M.L.J. 699, I.L.R. (1955) Mad. 356 at 385.
2. (1955) 1 M.L.J. 243
3. (1954) 2 M.L.J. (Andh. High Court) 42 at 43.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR JUSTICE K. VEERASWAMI AND MR JUSTICE M NATESAN

Sri Velur Vaidyanathaswami Devasthanam, Seerkali and others .. *Petitioners**

v.

State of Madras .. *Respondent*

Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963), sections 7 and 3 (b)—Mohini grants—Origin and nature of—If "minor inams" falling within purview of the Act

Mohini inam grants were only assignment to temples of the right of the Government revenue over specified lands The grant of land revenue is not in respect of any inam land but on lands which were held on ryotwari tenure These assignments of revenue were in lieu of existing cash allowances which in turn were being made as compensation for temple lands resumed by the East India Company The so-called Mohini inam grants are not therefore "minor inams" within the meaning of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) and as such do not fall within the purview of that Act.

(For history of Mohini grants see *Secretary of State* v *Vaithilinga Pandara Sannadhi*, Appeal Nos. 40 to 42 etc. of 1936.)

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue Writs of Prohibition requiring the State of Madras to forbear from applying the provisions of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) to the petitioners' inams covered by (*A*) (1) T D. Nos 602 and 603 in Karkoil Village, Karkoil Vattam, Sirkali Taluk, Thanjavur District, (2) T D No 591 in Edakudi Thenpathi Village, (3) T D. No. 590 in Keezhaveli Village, (4) T D. No 594 in Santhaputhur Village, (5) T D. No 595 in Kazhi Kavalpuram Village, (6) T D No. 562 in Vaithayanathapuram Village Nos 2 to 6 in Edakudi Vadapathi Vattam, Seerkali Taluk, Thanjavur District, (7) T D No 565 in Mallikudi attached to Punganur Village, (8) T D. No 566 in Varavagudy attached to Vadakuveli Village, Nos 7 and 8 in Punganur Vattam, Seerkali Taluk, Thanjavur District and (9) T D No 1132 in Athukudi Village, Dharmathanapuram Vattam, Mayuram Taluk, in W.P No. 2064 of 1965, (*B*) (1) T D No. 1143 in Kalathur Village of Pandur Vattam, Mayuram, Taluk, and (2) T D No 1242 in Seedhakkamanagalam Village of Mela Ramasethi Vattam, Nannilam Taluk, in W P No 2088 of 1965, (*C*) (1) T.D No. 586 Thenur Village, Kondal Vattam, Seerkali Taluk, and (2) T D No. 102 in Tadalan Koil Village, Seerkali Taluk in W.P. No 2089 of 1965, (*D*) T D No. 1124, Kuzhichar Village, Mayuram Taluk, in W P No. 2125 of 1965, (*E*) T D No. 1241 in Peralam Village, Nannilam Taluk, in W P. No. 3040 of 1965 respectively or interfere with the same in pursuance of G O (P.) No 309, Revenue, dated 9th February, 1965 published in the *Fort St. George Gazette* (Extraordinary), Part II, Section 1 dated 15th February, 1965 and (*F*) T.D Nos. 1181 and 1183 situate in 38 Kuttalam Village, Mayuram Taluk, or collect the increased assessment of Rs 1,019 11 levied on these Mohini inam lands for Fasli 1374 and for subsequent Faslis in W P. No 437 of 1966 and (*G*) Mohini inam lands of the petitioner Devasthanam or collecting the enhanced assessment of Rs. 21,891 94 levied for Fasli 1374 and for subsequent Faslis in respect of the Mohini inam granted to the petitioner Devasthanam in respect of its lands in Kuruvadi Koilpathu, hamlet of Tirupanandal Village and its lands in Sikkaraickanpettai Village both in Kumbakonam Taluk, Thanjavur District in W P. No. 446 of 1966

V Vedantachari and *T. M. Chinnaiya Pillai*, for Petitioner.

The Advocate-General and *K Venkataswami* for the Additional Government Pleader, on behalf of Respondent.

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* W.P Nos 2064, 2088, 2089, 2125 and 3030 of 1965 and 437 and 446 of 1966.

24th June, 1966.

The Judgment of the Court was delivered by

Natesan, J—This batch of Writ Petitions under Article 226 of the Constitution relates to what are called Mohini grants which have been notified under the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 The constitutional validity of the Act which is challenged has been considered and upheld by us in the judgment in Writ Petitions Nos 1552 of 1965, 1640 of 1965 etc, just now delivered. That does not preclude the examination of the question raised that these grants are not inams at all The petitioners are religious institutions in the Thanjavur District. Typical of their claim W P No 2064 may be taken up. The Head of the Dharmapuram Mutt, Dharmapuram, Mayuram Taluk the hereditary trustee of Sri Velur Vaidyanathaswami Devasthanam, Vaitheeswaran Koil, is the petitioner therein. The petitioner is affected by a notification made under the Madras Minor Inams Abolition Act XXX of 1963 with reference to this Mohini inam grant which, it is stated, is assignment of right of the Government Revenue over specified lands · (*a*) the right to the Government Revenue of Rs. 862-0-11 on its lands in Karkoil Village, Karkoil Vattam, Seerkali Taluk, covered by T D No 602 for the purpose of spending the same for the religious services in the petitioner temple; (*b*) the right to the Government Revenue of Rs. 202-8-7 on its lands in Karkoil Village, Karkoil Vattam, Seerkali Taluk, covered by T D No. 603 for the purpose of pooja expenses of Sri Mullavanthaswami temple at Thirumullavasal, Seerkali Taluk, Thanjavur District; (*c*) the right to Government Revenue of Rs. 902-7-10 on its lands in Edakudi Thenpathi Village in Edakudi Vadapathi Vattam, Seerkali Taluk covered by T D. No. 591 for the pooja expenses of the petitioner Devasthanam ; (*d*) the right to the Government Revenue of Rs. 1,137-5-7 on its lands in Keezhaveli Village, Edakudi Vadapathi Vattam, Seerkali Taluk, covered by T D. No 590 for the pooja expenses of the petitioner Devasthanam ; (*e*) the right to the Government Revenue of Rs 1,220-0-6 on its lands in Santhaputhur Village, Edakudi Vadapathi Vattam, Seerkali Taluk, covered by T.D No 594 for the pooja expenses of the petitioner Devasthanam ; (*f*) the right to the Government Revenue of Rs. 885-10-2 on its lands in Kazhi Kavalpuram Village, Edakudi Vadapathi Vattam, Seerkali Taluk, covered by T D No 595 for the pooja expenses of the petitioner Devasthanam ; (*g*) the right to the Government Revenue of Rs. 504-14-8 on its lands in Vaithyanathapuram Village, Edakudi Vadapathi Vattam, covered by T D No 562 for the pooja expenses of the petitioner Devasthanam ; (*h*) the right to Government Revenue of Rs 193-9-8 on its lands in Mallikudi attached to Punganur Village, Punganur Vattam, Seerkali Taluk, covered by T D No. 565 for the pooja expenses of Sri Sivalogathyagarajaswami Devasthanam at Achalpuram ; (*i*) the right to the Government Revenue of Rs. 439-13-1 on its lands in Varavugudy attached to Vadakuveli Village, Punganur Vattam, Seerkali Taluk, covered by T D No 566 for the pooja expenses of Sri Sivalogathyagarajaswami Devasthanam at Achalpuram ; and (*j*) the right to the Government Revenue of Rs. 557-9-0 on its lands in Athukudi Village, Dharmathanapuram Vattam, Mayuram Taluk, covered by T D No 1132 for the pooja expenses of Sri Vedaranyeswaraswami Temple, Vellalarkoil. The case of the petitioner is that the assignment of the revenue in these cases was in lieu of money allowance called *Tasdik* which the Devasthanam was receiving from the British Rulers in continuation of similar payments from the Rajas of Thanjavur. It is stated that on objection taken in England to money allowances in favour of Hindu religious institutions, these money allowances were substituted by assignment of land revenue of value equal to the money allowances plus 10 per cent. to cover vicissitudes of season and cost of collection These revenue assignments were called Mohini grants and were recognised and confirmed during the Inam Settlement Inam title deeds were also issued The lands of which the land revenue was assigned had already belonged to the institution It is stated in the affidavit that the grant of land revenue is not in respect of any 'inam land' but on lands which were held on ryotwari tenure. When in the first instance assessment was levied under Madras Inams (Assessment) Act LX of 1956, on objection being taken that the assignment was of the land revenue, that it related to

service tenure and that it was exempted by proviso to section 3 of the Act the assessment was cancelled The Inam Register extracts in respect of these Mohini inams which were produced, gives the following details : tax free : the grant is not an assignment of land but assignment of land revenue payable to Government subject to the payment of additional assessment direct to Government on account of extra cultivation *fassal* or *tirva jasti*, water tax, etc. Under the column "by whom granted and in what year" it is stated that it was granted by the Government in Fasli 1273, that is, 1863-64. It is further found therefrom that revenue was assigned in lieu of ready money allowance.

In the counter-affidavit filed on behalf of the State, it is not controverted that the lands in question of which the revenue is assigned are held under ryotwari tenure. Apart from the usual general denial, it is pointed that if the contention of the petitioner is that the grants in question are not 'minor inams' within the meaning of the Act he should resort to the statutory remedies provided under the Madras Inams (Supplementary) Act, 1963 (Madras Act XXX of 1963).

It is admitted that all the inams in question are Dumbala inams, tax free, and they are not assignment of lands but assignment of land revenue but that it is asserted that they are only inams The history of Mohini grants is found discussed in the *Secretary of State for India in Council* v *Vaithilinga Pandara Sannadhi Avergal*[1], by a Division Bench of this Court consisting of Wadsworth, J , and Patanjali Sastri, J., (as he then was) Referring to the early money allowances that had been made by the East India Company, it is observed that the origin of these allowances is obscure, that they generally represented endowments granted to the various temples in pre-British days, and that many of these allowances were in lieu of temple lands resumed by the East India Company When the Madras Government wanted to withdraw from all interference with the temples and places of religious resort, the Government of India insisted on the transfer to the temples of the lands recognised as temple lands and asked for further information regarding those cases in which the original temple lands could no longer be traced and in respect of which money payments were being made from the treasury in lieu thereof, with a view to commutation of these payments into assignments of revenue. It is noticed in the judgment that from the records produced in the case many of the allowances represented ancient resumption in respect of which it was found impossible to trace the original lands, so that some compensation in another form was necessary It is further noticed in the judgment :

> "The Collector was unable to trace the origin of these grants ; but he points out that from the commencement of the British Rule in Tanjore, these and other connected allowances *have always been recognised as a charge upon the* revenue of the district "

The minutes in the matter of these grants show that the assignment of land revenue in question was made as the equivalent of specific money payments and the rights of the assignee should be restricted to the specific area in which the amount of land revenue has been granted and that any extension of cultivation beyond such specific areas should be treated as liable to the payment of assessment to Government. In his report dated 5th May, 1891 in respect of the Resettlement of the Tanjore District, the Deputy Commissioner remarks thus :

> "Mohini inams situated within Government Villages" "These so-called inams are assignments of revenue to temples 'the pattadars simply pay assessment to temples instead of to Government and for second crop and *tirva jasti* they are dealt with like Government patta lands at the annual jamabandi as is done with other inam lands '"

It is observed in the judgment that the whole intention appeared to be to give to the temples the right to collect revenue approximately equivalent to the cash allowance collection and a small margin to cover seasonal fluctuations. It was held in one of the appeals that the grant was not of the specified lands on the ordinary minor inam tenure, implying the surrender *in toto* of the Government's right to

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1. Appeal Nos. 40, 41, 42 etc. of 1936.

revise the assessment. The grant was clearly, it is stated, a grant of the present revenue on the specified lands, the Government retaining the right to future increments of revenue and the right to impose assessment on lands within the villages not covered by the specific terms of the assignment. The appeals in those cases arose when the Government's right to resume and resettle these Mohini inams restoring the cash allowances was questioned.

One thing emerges from the facts which have been placed before us and it is that these assignments of revenue were in lieu of existing cash allowance. The money allowances represented ancient resumptions in respect of which the original lands could not be traced and these cash allowances were substituted by assignment of equivalent revenue from lands with addition of 10 per cent. as collection charges to provide for vicissitudes of season and cost of collection. It is specifically averred in the affidavit that the lands are held under ryotwari tenure and this has not been controverted by the State in the only counter-affidavit that has been filed in this batch of cases.

On these facts the first contention on behalf of the petitioners is that there is no such thing as inam lands in these cases. Inam has been defined in Madras Act XXX of 1963 as a grant of the Melwaram in any inam land or a grant of both the Melwaram and Kudiwaram in any land which grant has been made, confirmed or recognised by the Government. Assuming that it could be said that there is a grant of Melwaram, the contention is that the Melwaram is not on inam land. The lands are held under ryotwari patta. Our attention was drawn in this connection to section 5 of Madras Act XXXI of 1963 which provides for determination of the question whether any non-ryotwari area is or is not an existing inam estate or not. The declaration provided for under the section is whether the non-ryotwari area specified is a minor inam or one or other of the inams which come under Madras Acts XXVI and XXX of 1963. It is submitted that it follows from this that as the land revenue is in respect of ryotwari land, it could not be considered to be a minor inam as contemplated under Madras Act XXX of 1963. Going through the several provisions of the Act it could, in our view, be properly inferred that the minor inam dealt with under the Act should be a grant of both the warams but for the fact that the provisions of section 8 militate against such conclusion. Section 7 of Madras Act XXX of 1963 refers to ' inam land ' as any land comprised in a minor inam. When the grant is only of Melwaram, it is not appropriate to say that the land is comprised in the minor inam. The vesting section, section 3 (*b*) also would lead to a similar conclusion. It reads :

" Every minor inam including all communal lands etc "

The inam that vests must ordinarily be one that is capable of including waste lands, porambokes, etc. May be that the draftsman of the Act has adopted the customary phraseology found in inam title deeds which had raised doubts and necessitated Madras Act VIII of 1869 providing that nothing contained in any title deed shall be deemed to confer on any inam holder any right to land which he would not otherwise possess. No doubt in one sense even where the grant is of the revenue only, the revenue being derived from the land, in a loose way and straining the language the land could be said to be comprised in an inam grant.

It is contended for the petitioners that the mere fact that the Inam Commission has issued title deeds or the assignment of the land revenue is referred to as Inam grant, will not make it an Inam, if in essence it is not an Inam. It is argued that the assignment of the revenue being in lieu of cash allowances, the element of gift or favour or benefaction is wanting to make the grant an Inam. Our attention is drawn to the observations in *Sellappa Goundan* v. *Bhaskaran*[1] .

" The circumstance, that the grant was treated as an inam at the time of the Inam Settlement proceedings and title deeds were issued on that basis, cannot affect the original character of the grant. An Inam title deed does not operate either to enlarge or abridge the rights of inamdars under the original grant " .

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1. (1960) 2 M.L.J. 363 at 367.

It is argued that in fact there was no Inam earlier for consideration at the time of the Inam Settlement. The Government had been, instead of discharging the obligation of returning to the temples the lands that had been taken from them, giving them money allowance. This money allowance was substituted by a fixed revenue grant. Therefore it is argued that these are not Inams at all It is contended that in substance it was assignment of money by the Government. They had assigned the right to collect the revenue in discharge of their obligation It is, therefore, submitted that to acquire this right treating it as Inam will be in effect taking away money, and that there could be no acquisition of money under the Constitution. Learned Counsel in this connection drew our attention to the observations in the *Darbhanga case*[1]. Mahajan, J. (as he then was) observed at page 943 in relation to acquisition of arrears of rent :

> " Taking money under the right of eminent domain, when it must be compensated in money afterwards is nothing more or less than a forced loan Money or that which in ordinary use passes as such and which the Government may reach by taxation, and also *rights in action which can only be available when made to produce money*, cannot be taken under this power "

The learned Judge further observed at page 961 :

> " It is said by the learned Attorney-General that the subject-matter of acquisition in the present case is not money but choses in action It seems to me that there is no difference in principle between them because a chose in action can be available to the acquiring authority only when it is made to produce money , otherwise it is useless altogether "

In our view it is unnecessary to go so far and consider whether there could be an acquisition of these grants in the circumstances of the case for the reason that at the origin they are just cash allowances made by the State Article 31 (2) has undergone significant changes since the *Dharbanga case*[1], and besides there is Article 31-A. In our opinion the uncontroverted allegation that the land revenue relates to lands held under ryotwari tenure and the further fact that the assignment of the revenue coming for the first time during the Inam Settlement was in lieu of cash allowances to which the temples were entitled and which have been charged on the State Treasury are sufficient to take these so-called Inams out of the category of Minor Inams which would fall under the provisions of the Madras Inams Abolition Act. Whether the State could reach these grants by any other Act does not arise for consideration now. It is stated on behalf of the petitioners that as the lands are held under ryotwari tenure, no applicat on would lie under Madras Act XXXI of 1963 and nothing has been suggested on behalf of the State as to why in the circumstances these petitions should not be allowed.

The Writ Petitions are, therefore, allowed and the rule *nisi* thereon made absolute. No costs.

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE P. RAMAKRISHNAN.

State of Madras represented by the Secretary to Government, Rural Development and Local Administration Department, Madras-9 .. *Appellant**

v.

Tirunelveli Municipal Council represented by its Chairman Thiru M. Abdul Majid and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), *sections* 41 (1) *and* 41 (1-*A*)—*Power to supersede a Municipal Council under—Nature of—Court's power under Article* 226 *of the Constitution of India to strike down the exercise of the power*—Mala fides—*Proof and effect*—" *Persistently makes default* "—*Meaning of.*

Words and Phrases—Persistent default.

The power to supersede a Municipal Council conferred by section 41 (1) read with section 41 (1-A) of the Madras District Municipalities Act (V of 1920) is essentially an administrative power

1. (1952) S.C.R. 889 : (1952) S C J. 354.

*W.A. Nos. 148 & 149 of 1966. 2nd September, 1966.

(though a power which is to be exercised in a quasi-judicial manner) in which the exercise of the power depends on the subjective satisfaction of the State Government that a Municipal Council is not competent to perform the duties imposed on it by law, or that it persistently makes default in performing them, or exceeds or abuses its powers.

This decision itself is subject to the *quasi-judicial* process made obligatory by section 41 (1-A) and to the principles of natural justice Therefore, the grounds for the action proposed must be communicated to the Council, a reasonable period for the explanation of the Council must be given, the explanations or objections should be duly considered and all the principles of natural justice should be adhered to

If the *quasi-judicial* character of the process has not been adhered to or any principle of natural justice has been violated, the Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, will not hesitate to strike down the order The Court is not concerned with the materials upon which the Government might act, prior to the commencement of the *lis*, which commences only with the issue of a show cause notice under section 41 (1-A), but once the *lis* or *quasi-lis* has commenced extraneous matters or considerations should not intrude into the actual decision

Apart from this, there must be a reasonable nexus between the ground upon which the Government purports to act and the satisfaction which is enacted in section 41 (1) of the Act The material must relate to the incompetency of the Council to perform its duties or to persistent default in performing the duties imposed on it by law or excess or abuse of power If the material is extraneous to these considerations, the Court may proceed to strike down the exercise of power, upon the analogy of the ' no evidence ' rule *But the adequacy of the material, provided that it is relevant, and the wisdom or unwisdom of the actual exercise of power,* do not concern the Court, for the Court cannot substitute its satisfaction or absence of satisfaction, for the satisfaction of Government that the ingredients were established

If the exercise of the power is *mala fide,* or is a colourable exercise of power for some ulterior purpose, the Court will never hesitate to strike down the exercise of the power.

Mala fides would include a colourable exercise of the power, that is, an exercise of power which is ostensibly so, but which is really a pretext with the ulterior objective or for achieving some other end But it is for the party alleging *mala fides* to establish that element as a reasonable inference, on the facts and probabilities shown to exist, a mere allegation of *mala fides,* as not entirely improbable, will not do and Courts have to take notice of the increasing trend to allege this, sometimes with little or no evident substance

The argument that " persistent default " within the meaning of section 41 (1) of the Act could occur only when there is contumacious continuance in some course and neglect or breach of duty against " opposition or remonstrance " and that without the presence of this element of " opposition or remonstrance " persistent default could not be established, is untenable The word " persist " comes from two roots " per " and " sisters ", to stand. It implies " to continue firmly or obstinately in a state, opinion, purpose, or course of action, especially against opposition " But while contumacious perseverance, notwithstanding opposition or remonstrance is the substance of the expression, nevertheless, it cannot be said that opposition or remonstrance is essential We can well conceive of a case where default is persistent though the opposition or earlier remonstrance has not happened at all.

In the instant case the Government Order dated 2nd July, 1966 superseding the Tirunelveli Municipal Council for a period of two years under section 41 (1) of the Madras District Municipalities Act cannot be struck down under Article 226 of the Constitution of India The grounds on which the Order was made were that the Municipal Council failed to conduct seven of its meetings in an orderly manner and broke out without transacting any business, that it appointed an employee without reference to the panel of names sent by the Employment Exchange and that it passed a resolution expressing sympathy for the victims of the anti-Hindi agitations, a matter quite outside the purview and concern of the Council. None of these charges could be said to be irrelevant to the ingredients mentioned in section 41 (1). Once this is so the satisfaction of Government cannot be impugned on any objective criteria

Nor can it be said, on the facts of this case, that the power was exercised *mala fide.*

The plea that the State Government in directing the supersession took into account the reports of the Collector, sent to the Government before the charges were framed and the remarks of the Collector on the explanation submitted by the Council, without giving an opportunity to the Municipal Council to controvert the data thus supplied and that therefore there was a contravention of the principles of natural justice, is also not sustainable The statute provides no restrictions as to the manner in which the Government should be apprised of the data against the Council before it commences to formulate the charges, nor has it prescribed any restrictions as to the manner in which the Government should consider the objections received from the Council, in answer to the show cause notice

Appeals under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Kailasam dated 11th August, 1966 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 1789 and 1917 of 1966 presented under Article 226 of the Constitution of

India to issue writs of *certiorari* calling for the record pertaining to the passing of the Order in G.O. Ms No. 1643, Rural Development and Local Administration, dated 2nd July, 1966, and quash said order of the Respondent in both the Writ Petitions and made therein.

The Advocate-General and the Additional Government Pleader on behalf of the Appellant.

P. R. Gokulakrishnan and *R. Balsubramaniam*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C.J.—These appeals are by the State of Madras from the Judgment of Kailasam, J., in W.P. Nos. 1789 and 1917 of 1966 before the learned Judge, in which he directed the issue of a writ of *certiorari* quashing the orders of the appellant in G.O. Ms. No. 1643 (Rural Development and Local Administration), dated 2nd July, 1966. I may tersely state that, by virtue of this Order, Government purported to exercise the powers vested in them under section 41 (1) read with section 41 (1-A) of the Madras District Municipalities Act, and superseded the Tirunelveli Municipal Council for a period of two years from 2nd July, 1966. As the appeals were argued before us they traverse not merely the facts on the record but also a wide area of questions of law upon the nature and implications of this statutory power vested in Government, which do merit very careful consideration at our hands.

At the outset itself, I think we should approach the problems involved in these appeals from the perspective of first defining and delimiting the scope of the statutory power under sections 41 (1) and 41 (1-A) of the Act, as well as the implications of the exercise of that power. This is essential, for the simple reason that, otherwise, we are likely to be involved in issues of fact, without constantly bearing in mind the character of the judicial review that this Court might exercise in such an instance, under Article 226 of the Constitution. In brief, these are the questions involved Is this power essentially an administrative power with the subjective satisfaction of Government as the determining factor for its exercise, or can objective tests be applied by the Court? Again, by virtue of section 41 (1-A), is it proper to interpret that section as bringing into the exercise of this essentially administrative power, a quasi-judicial process? If that is the proper view, can this Court assess the inadequacy of the material for the order of supersession, or should it confine itself to the bare relevance of that material, and to the observance of the quasi-judicial process and principles of natural justice? Finally, there is the question, upon which the learned Judge (Kailasam, J) gave his conclusion in favour of the State, namely, whether the act of supersession is a *mala fide* or colourable exercise of power, for the reason that the largest single group in the Tirunelveli Municipal Council was of the Dravida Munnetra Kazhagam, which forms the opposition in the State to the Congress Government.

Sections 41 (1) and 41 (1-A) of the District Municipalities Act are as follows :

" 41 (1) If in their opinion a council is not competent to perform or persistently makes default in performing the duties imposed on it by law, or exceeds or abuses its powers, the State Government may by notification direct that the council be dissolved and reconstituted on such dates as the State Government may fix in that behalf or, they may, if they think necessary, supersede the council for a specified period not exceeding two years and the notification shall be laid before both Houses of the State Legislature

Provided as follows

(*a*) for the purpose of completing the elections to a council which has been dissolved the State Government may from time to time, extend the time fixed by them under this sub-section for its reconstitution

(*b*) the State Government shall not supersede a portion only of the municipal council.

(1-A) Before publishing a notification under sub-section (1) the State Government shall communicate to the council concerned the grounds on which they propose to do so, fix a reasonable

period for the council to show cause against the proposal and consider its explanation or objections, if any

Provided that where a council has disobeyed an order issued under section 36 the State Government shall not be bound to follow the procedure laid down in this sub-section "

A very brief outline of the situation may be desirable, at this stage, before we proceed to the legal arguments G.O Ms. No 1376 (Rural Development and Local Administration), dated 27th May, 1966, is the notice to the Municipal Council to show cause, and it charges the council with 'defaults in the performance of the council's functions, as indicated There are nine heads of charge, containing specific allegations, the Order then proceeds to state that " there has been faction and confusion in the Council and consequent persistent default in performing the duties of the Council imposed on it by law." The explanation of the council to the charges is dated 16th June, 1966, and the Tamil text contains the detailed reply of the Council, after which the Council proceeds to accuse the Government of a political motive, in contemplating this action. The supersession was ordered by G.O. Ms. No. 1643, dated 2nd July, 1966. The findings are given by Government, with stated reasons, holding that the charges were proved, and paragraphs 10 and 11 of this Order make references to the inspection and other reports of the Collector, after which there is a notification to the effect that the Council was not competent to perform its duties, and has persistently defaulted in performing them, which justified the supersession I may add here that, broadly stated, the heads of charge relate to convened meetings of the Council on various dates, which broke up in disorder and without the transaction of business, while one head of charge relates to an irregular appointment, and another to a meeting which was adjourned after the passing of a resolution recording sympathy with the victims of the Anti-Hindi agitation, a matter quite outside the purview and concern of the council

On the observance of the quasi-judicial process, enacted in section 41 (1-A), and the principles of natural justice, the arguments have resolved themselves into two main categories On behalf of the superseded Council, it is firstly urged that extraneous matters, on which the Council had no opportunity to explain, have been taken into consideration in the promulgation of the Order, as revealed by paragraphs 10 and 11 of the Order , the reference is to the inspection report of the Collector, another report dated 23rd March, 1966, of the Collector, and the comments of the Collector, which were not disclosed to the Municipal Council. The other argument is that there has been no failure in the performance of any of the statutory duties imposed on the Council, and that the fact that there are factions in the Council, which led to the break-up of seven or eight meetings in disorder, without the transaction of business, is not relevant for purposes of sections 41 (1) and 41 (1-A). In other words, the argument is that, even if the adequacy of the material cannot be assessed, where material not relevant to the statutory power has been taken into account for its exercise, the Court must strike down the act of Government. This is apart from the question of alleged *mala fides*, which has to be separately dealt with.

There is a bewildering multiplicity of precedents, both of the United Kingdom and of the Supreme Court and the High Courts in this country, on the nature of an administrative power, as distinguished from a judicial or quasi-judicial power, upon when an act of the exercise of the power is to be deemed to be quasi-judicial in character, what rights to the affected party flow from this character, and how far Courts, in judicial review, can re-assess the decision. From these precedents, I have selected those which appear to me to be the most significant in the evolution of legal ideas on this aspect. At the outset itself, I may state that the perspective stressed by the learned Advocate-General for the State seems to me to be the proper one. The learned Advocate-General would make a significant distinction between a discretion which is to be exercised with regard to a Fundamental Right guaranteed by the Constitution, and some other right afforded by statute: vide *Pannalal Binjraj* v.

Union of India[1]. As he points out, a right to Local Self-Government, or the right of a Municipal Council to carry on its administration as such, cannot be termed as Fundamental Right It is a right springing from the statute alone, and the status of the Council is derived entirely from the Act, for that reason, the Council can only function within the provisions of the Act, and the restrictions imposed by the statute apply to the Council It might be a different matter, if the act of supersession of the Council violated any Fundamental Right, either of the citizens or of the members of the Council, but that is not the argument Again, there can be no doubt whatever that, having regard to the language of the Legislature in enacting section 41, this is, essentially, an administrative power vested in the Executive, though a power which is to be exercised in a quasi-judicial manner, in the process of its exercise, under section 41 (1-A) The learned Advocate-General stresses that section 41 (1) makes the subjective satisfaction of Government, with regard to the competency of the Council to perform its duties, or persistent default in the performance of its duties, or excess or abuse of its powers, the criterion for action, by the use of the words "in their opinion", this provision has to be distinguished from other provisions in enactments of other statutes which do not contain these significant words. The difficulty here is, does the coupling of the quasi-judicial form or process of action, made obligatory under section 41 (1-A) read with section 41 (1), convert the administrative power into a judicial power, so that it is not merely incumbent on Government to record their reasons, but the very exercise of the power is amenable to objective tests, in judicial review?

With reference to the case-law, a brief history of its evolution is of interest and significance. After this, I shall devote greater attention and analysis to a few selected cases of the United Kingdom and of the Supreme Court. Atkin, L J., in *Rex* v. *Electricity Commissioners*, ex parte *London Electricity Joint Committee Company*[2], laid down the dictum, now classic, of the test of a quasi-judicial process, amenable to writ jurisdiction

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority,, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs"

A gloss was put on these observations by Lord Heward, C J. in *Rex* v. *Legislative Committee of the Church Assembly* ex parte *Haynes Smith*[3] to the effect that it must appear not merely that the said body should have the legal authority but also that it must further be required to act judicially; this duty is an ingredient, which must be present from the test to be satisfied In *Nakkuda Ali* v. *M F D E.S. Jayaratne*[4] the Privy Council dealt with an order of the Controller of Textiles in Ceylon, which empowered him to cancel a licence where the Controller had reasonable grounds to believe that a dealer was unfit to be such. The Privy Council held that this did not necessarily imply that the Controller must act judicially in exercise of the power, and if he is not so bound, his decision would not be amenable to judicial review.

It was against this background of the development of the law that we have the leading decision of *Ridge* v. *Bladwin*[5]. This related to the powers of a Watch Committee to dismiss an officer on the ground of neglect of duty, or unfitness, under section 191 of the Municipal Corporations Act, 1882 The decision is a landmark, for the observations of Lord Reid with regard to the gloss put upon the famous passage in the judgment of Atkin, L.J., in *Rex* v. *Electricity Commissioners, ex parte London Electricity Joint Committee Co.*[2], by Lord Hewart, C.J. Lord Reid said.

> "If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities"

A catena of decisions follows this passage. But the learned Advocate-General has devoted some time to an analysis of these precedents, and satisfied us that, in every one of these cases, it was a matter of the alleged infringement of a principle of natural

1. (1957) S C R 233 at 261.
2. L R (1924) 1 K.B 171.
3. L.R (1928) 1 K.B 411.
4. L R (1951) A C 66
5. L R. (1964) A.C. 40.

justice. Lord Reid then said that both Atkin, L.J., and Bankes, L.J., "inferered the judicial character of the duty from the nature of the duty itself". *Nakkuda Ali* v. *Jayaratne*[1], has been dissented from, on the statement of its principle.

Considerable light is thrown upon this evolution, by a discussion which appears in the judgment of Subba Rao, J., (as he then was) in *Dwarka Nath* v. *The Income-tax Officer*[2] He referred to the dicta of Parker, J., in *Rex* v. *Manchester Legal Aid Committee*[3] and stressed that "a duty to act judicially may arise in widely different circumstances, and it is not possible or advisable to lay down a hard and fast rule or an inflexible rule of guidance". An administrative body, in ascertaining facts or law, may be under a duty to act judicially, notwithstanding that its proceedings have none of the formalities of a Court of law. The evolution of the case-law has been discussed in considerable detail by Gajendragadkar, C.J., in *Associated Cement Companies Ltd.* v. *Sharma and another*[4]. The judgment of the Supreme Court referred to the following authorities, apart from the English cases, which I have earlier noticed :

(1) *Province of Bombay* v. *Kusaldas S. Adwani and others*[5], (2) *Nagendranath Bora and another* v. *The Commissioners of Hill Division and Appeals, Assam and others*[6], (3) *Shivji Nathubhai* v. *The Union of India and others*[7], (4) *The Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank Ltd., and the Bharat Bank Employees Union, Delhi*[8], (5) *Messrs. Harinagar Sugar Mills Ltd* v. *Shyam Sundar Jhunghunwala and others*[9], (6) *Jaswant Sugar Mills Ltd., Meerut* v. *Lakshmichand and others*[10], (7) *Engineering Mazdoor Sabha representing Workmen employed under the Hind Cycles Ltd., and another* v. *The Hind Cycles Ltd., Bombay*[11], and (8) *Indo-China Steam Navigation Co., Ltd.* v. *Jasjit Singh, Additional Collector of Customs, Calcutta and others*[12]. The principle was then tersely stated by the learned Chief Justice in this form, as crystallising the evolution of the case-law :

> "It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of the writ jurisdiction has been extended in a corresponding measure."

Kailasam, J. relies on this very passage for his conclusion that the exercise of the power, in this particular case, could properly be the subject of judicial review, and lend itself to objective tests to be imposed by the Court, even apart from the problem whether the quasi-judicial process enacted in section 41 (1-A) has been duly observed, and the principles of natural justice have been adhered to. But this, in my view, proceeds really on a misconception. The evolution of the case-law makes clear one cardinal feature, apart from every thing else, the distinction between an essentially administrative power, and a quasi-judicial power, cannot be determined upon any abstract propositions of law. Though our Constitution proceeds on an apparent theory of the separation of powers, it is undeniable that there are zones of intermingling of those powers, the Executive sometimes has functions analogous to judicial functions. Courts have administrative powers, and even the Legislature may have its own area of judicial or executive capacities. The matter has to be judged, solely and entirely, upon the particular enactment, its terms and intendment. For instance, a closely analogous case is *Radheshyam* v. *State of Madhya Pradesh*[13] The learned Judge (Kailasam, J.) has also referred to, and cited, this decision. But when we closely examine it, and particularly the terms of both setctions 53-A and 57 of the Central Provinces and Berar Municipalities Act, 1922, we find a very vital distinction. Under both these sections, the State Government has power to act in the case of incompetence in the performance of duty, or persistent default in the performance of duty, by the concerned Committee ; but significant words, such as "in the opinion of Government", are not to be found ; in other words, though

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1. L.R. (1951) A.C. 66.
2. (1965) 2 S.C.J. 296 : (1965) 2 I.T.J. 218 : A.I.R. 1966 S.C. 81.
3. L.R. (1952) 2 Q.B. 413 at 428
4. A.I.R. 1965 S.C. 1575
5. (1950) S.C.R. 621 : 1950 S.C.J. 451 : (1950) 2 M.L.J. 703.
6. (1958) S.C.R. 1240 : (1958) S.C.J. 798.
7. (1960) 2 S.C.R. 775 : (1960) S.C.J. 579.
8. (1950) S.C.R. 459.
9. (1963) S.C.J. 471 . (1962) 2 S.C.R. 339, 352.
10. (1963) (Suppl.) 1 S.C.R. 242.
11. (1963) (Suppl.) 1 S.C.R. 625.
12. A.I.R. 1964 S.C. 1140
13. (1959) S.C.J. 6 : (1959) 1 An.W.R. 5 : (1959) 1 M.L.J. (S.C.) 5 : A.I.R. 1959 S.C. 107.

the power is administrative, its very exercise depends on the establishment of an objective fact, that is, the incompetency of the Committee, for which the subjective satisfaction of the concerned Authority may by no means be adequate.

I shall refer to certain other precedents of this country, before proceeding to the leading cases relied on by the learned Advocate-General in the course of his arguments. In *Glaxo Laboratories* v. *A. V. Venkateswara*[1], a Division Bench of the Bombay High Court held, with referenc to an assessment under section 87 of the Sea Customs Act, that absence of reasons in the order of assessment was not fatal to an order, but that the grounds given in the affidavit filed could be looked into. This is on the aspect that, according to the learned Advocate-General, the bare notification superseding the Council (page 16 of the typed volume) would have been sufficient compliance with the law, though detailed reasons were actually given in the Annexure. Kailasam, J., quoted the observations of Subba Rao, J., (as he then was) in *M. P. Industries Ltd.* v. *Union of India*[2], and also the observations in *Govindrao* v. *State of Madhya Pradesh* [3]. But we note that both those decisions have relevance to the exercise of a frankly judicial power. One instance of considerable interest on this aspect, is to be found in *Kareli Municipality* v. *State*[4]. Hidayatullah, C.J. (as he then was) held, with respect to charges framed against a Municipal Committee and the explanations submitted by that Committee, that it was too wide a proposition that the Court could not at all proceed into the adequacy of the material, and that, apart from *mala fides*, arbitrariness, absence of jurisdiction or violation of the principles of natural justice, there was the ground of quite insufficient evidence : presumably, this would come under the kind of " no evidence " rule, which is well-known in the Administrative Law of England and the United States of America.

The contention of the learned Advocate-General may, therefore, be expressed in this form. Where there is no question of the deprivation of a Fundamental right, but the status of the concerned body and its powers are both derived from a statute, and subject to the restrictions of that statute, we must look to the statute alone for the interpretation of function or power possessed by Government. Where the words, such as " in their opinion " are deliberately used, this is a subjective satisfaction, and essentially an administrative power ; in its exercise, a quasi-judicial form or process may well be engrafted on it, and the learned Advocate-General concedes that this is the effect of section 41 (1-A) of the Act But his point is that, so long as relevant material was placed before Government, and the Government acted in *bona fide* exercise of the statutory power, and the quasi-judicial process was respected as well as the principles of natural justice, this Court ought not to interfere It should not, in judicial review, constitute itself a judge of the adequacy of the facts on which Government acted, or the wisdom of the steps taken.

Apart from the leading case of *Ridge* v. *Baldwin*[5], the learned Advocate-Genera relies on (1) *Johnson & Co.* v. *Minister of Health*[6], (2) the criteria laid down in *Kesari Mal* v. *The State*[7], (3) *Hubli Electricity Co.* v. *Province of Bombay*[8]; (4) *Ross-Clunis* v. *Papadopoullos*[9], (5) *The Queen* v. *The Bishop of London*[10], and (6) *Board of Education* v. *Rice*[11]. Of these cases, I might immediately refer to the facts in the *The Queen* v. *The Bishop of London*[10], where the question related to the discretion of a Bishop under the Public Worship Regulation Act, 1874, and Lord Esher, M.R., observed that the nature of the discretion is judicial, but that if the Bishop honestly and fairly undertook to consider the circumstances, he was not bound to consider every one of them in the record of his decision, and that his action could not be impugned on that ground.

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1. A.I R 1959 Bom 372.
2 A I R 1966 S C 671
3 A I R 1965 S C 1222
4 A I R 1958 M P 323
5 L R (1964) A C 40
6. (1947) 2 All E R 395.
7 A I R 1957 Raj 284 at 288, Ph 18
8 L R 76 I A 57 , (1949) 2 M L J 30 : A I R 1949 P C 136
9 (1958) 1 W L R 546
10 24 Q B D 223, 225
11 L R (1911) S C. 179

Certain of the cases cited by the learned Advocate-General deserve special mention One of them is *Ross-Clunis* v. *Papadopoullos*[1], where the question related to an order under Regulation 3 by the Commissioner of Cyprus, imposing a collective fine on the assessable Greek-Cypriot inhabitants of the area The case is important, because it laid down that the subjective satisfaction of the Commissioner was the test ; and that unless it could be shown that there were no grounds on which the Commissioner could be satisfied, that the inhabitants of the area were given an adequate opportunity of making representations, the Court could not interfere. This is an instance of essentially an administrative power, which is, nevertheless, subject to a quasi-judicial form and to the observance of principles of natural justice. Another case of great interest and importance is *Johnson's case*[2], where the owners of land comprised in a compulsory purchase order, confirmed by the Ministry of Health, applied for quashing the order, on the ground that the Minister was bound to act in a quasi-judicial manner, and that he had failed in that duty in not making available to the objectors the contents of certain letters written to the Minister by the local authority, before the order was made The discussion of relevant aspects in the judgment of Lord Greene, M R , is of considerable significance, on certain aspects of the present controversy. The Court held that, though the functions were essentially administrative, " there is super-imposed on his administrative character a character which is loosely described as 'quasi-judicial'." The *lis* is a stage in the process of arriving at an administrative decision, and the administrative decision is purely of that character, " based on his conceptions as to what public policy demands " In the accompanying judgment of Cohen, L J. an expression like 'quasi- *lis*' is also to be found. We do not think that we would be justified in regarding the statutory power, in the present case, as on all fours with the kind of function that was canvassed in *Johnson's case* [2] There is, surely, one vital distinction, in that a question of policy cannot intrude into decisions under section 41 (1), which must be rightly confined to the subjective satisfaction of the State in respect of specified ingredients. But the decision is of significance, as shown when a *lis* may be properly said to commence, and how far it would extend, in the exercise of the power. For instance, in the present case, upon the aspect of extraneous considerations, which have been dealt with by the learned Judge (Kailasam, J) it is important to note that every one of these documents adverted to, namely, all of the inspection reports of the Collector and the Administration Reports of the Collector, had been received by Government *before* the Government promulgated the 'show-cause' notice on charges culled from this material.

Certain decisions have been cited before us, on the question whether the Municipal Council was entitled, as of right, to copies of this material. The learned Advocate-General relies on the judgment of Rajamannar, C.J., and Rajagopala Ayyangar, J , in *D. Rajah* v. *Inspector of Municipal Councils and Local Boards, Madras*[3], for the view that Government need not have disclosed these earlier reports. But, the significant point is that the *lis* commenced only with the 'show-cause' notice and it thereupon took the quasi-judicial character envisaged by section 41 (1-A). The prior materials, which may include confidential reports, or notes by a Secretary to Government, upon which the *lis* commenced, are quite irrelevant to the proceeding , nor can the Municipal Council be said to have a proper concern with them, once the charges were formulated, with grounds for them made evident, in the 'show-cause' notice. Reference may be conveniently made here to the decision in *Hubli Electricity Co.* v. *Province of Bombay*[4]. Lord Uthwatt was dealing with the provisions of section 4 (1) (*a*) of the Electricity Act, 1910, where the words 'in the opinion of the Provincial Government' occurred both in sections 4 (1) (*a*) and 4 (1) (*d*) The Judicial Committee observed :—

> " Their Lordships are unable to see that there is anything in the language of the sub-section or in the subject-matter to which it relates, upon which to found the suggestion that the opinion of the Government is to be subject to objective tests "

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1 (1958) 1 W L R 546
2 (1947) 2 All E R 395
3 (1955) 2 M L J. 116 A I R 1955 Mad 584
4 (1949) 2 M L J 30 : L R 76 I A 57 : A I R 1949 P.C 136

On a careful consideration of the entire case-law, and the select precedents from a wide range that I have earlier set forth, I think that the following propositions may be rightly inferred, upon the character of the statutory power in this case, with respect to the scheme of the entire Act, the language used in sections 41 (1) and 41 (1-A), and the indisputable fact that we are not here concerned with any Fundamental Right under the Constitution, or its supposed infringement.

(*i*) This is essentially an administrative power, in which the exercise of the power depends on the subjective satisfaction of Government that a Municipal Council is not competent to perform the duties imposed on it by law, or that it persistently makes default in performing them, or exceeds or abuses its powers. Needless to say, such a satisfaction must be arrived at, in accordance with the quasi-judicial process enacted in section 41 (1-A) and it must be *bona fide* and not tainted by an ulterior object or colourable exercise of the power.

(*ii*) This decision itself is subject to the quasi-judicial process made obligatory by section 41 (1-A), and to the principle of natural justice Therefore, the grounds for the action proposed must be communicated to the Council, a reasonable period for the explanation of the Council must be given, the explanations or objections should be duly considered, and all the principles of natural justice should be adhered to. These hybrid functions, as pointed out in *Johnson's case*[1], frequently arise with reference to the complex organization of a modern State , there is nothing surprising in them. Both the essentially administrative character of the ultimate decision, and the necessity to observe the quasi-judicial process, must be kept in mind by the Courts before which the matter is brought up in judicial review

(*iii*) If the quasi-judicial character of the process has not been adhered to, or any principle of natural justice has been violated, the Court will not hesitate to strike down the Order. The Court is not concerned with the materials upon which the Government might act, prior to the commencement of the *lis* But once the *lis* or *quasi-lis* has commenced, extraneous matter or considerations should not intrude into the actual decision.

(*iv*) Apart from this, there must be a reasonable nexus between the grounds upon which the Government purports to act, and the satisfaction which is enacted in section 41 (1) of the Act. The material must relate to the incompetency of the Council to perform its duties, or to persistent default in performing the duties imposed on it by law, or excess or abuse of power. If the material is extraneous to these considerations, the Court may proceed to strike down the exercise of power, upon the analogy of the 'no evidence' rule *But the adequacy of the material, provided that it is relevant, and the wisdom or unwisdom of the actual exercise of power*, do not concern the Court, for the Court cannot substitute its satisfaction or absence of satisfaction, for the satisfaction of Government that the ingredients were established.

(*v*) If the exercise of the power is *mala fide*, or it is a colourable exercise of power for some ulterior purpose, the Courts will never hesitate to strike down the exercise of the power.

It is in the light of these principles, or guiding criteria, that I feel that the entire matter has to be viewed and assessed In this light, of the several grounds which have been adverted to by the learned Judge (Kailasam, J.) in his judgment, some at least appear to me to intrude into the merits ; in other words, to make the satisfaction of this Court the determining factor, by substituting its judgment. Since I feel that that cannot be done, the objections to the exercise of the power in this case will have to be limited, on the facts, to the following categories :

(1) Since, apart from one instance of an irregular appointment, the several charges relate exclusively to convened meetings, which broke up in disorder without transacting business, the question is whether there is any duty imposed on the Muni-

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1 (1947) 2 All E R 395

cipal Council, by law, to convene meetings and to transact business This aspect is made more acute by the fact that the Amended Rules require only one meeting in a month, during the relevant period 1st August, 1964 to 5th February, 1966, while the Municipal Council actually met many more times Another relevant aspect is the analysis of the statutory duties of the Council, with regard to the provisions of the Act, elaborately made by the learned Judge (Kailasam, J.) They could be classified as duties to maintain roads and channels of communication, duties to obtain revenues by taxes, duties of conservancy and sanitation, and the like, the learned Judge stresses that, apart from the obligatory monthly meeting, the law did not impose a duty on the Council to meet and conduct business, so long as these functions were carried out Hence, the failure to conduct seven of the meetings in an orderly manner, would not amount to incompetence or to persistent default.

(2) With regard to the expression 'persistent default' the learned Judge has held that this means contumacious continuance in some course, and neglect or breach of duty, against opposition or remonstrance. There is a power vested in Government under section 39 of the Act to give the Municipal Council a *locus penitentiae* to perform the duty within a time fixed, and since there was no remonstrance or opposition in this case, the break-up of the seven meetings could not be said to constitute 'persistent default'

(3) Extraneous matter has intruded into the decision of Government, in that certain reports, remarks and comments of the Collector, many of which were not disclosed to the Council, appear to have formed the basis of the *lis*, or the drawing up of the charges. Even more importantly, paragraphs 10 and 11 of the grounds of supersession render it clear that these reports and remarks were relied on by Government, in reaching its decision The Government have thus acted on material withheld from the Council and contravened the principles of natural justice

(4) There is the question of *mala fide* or colourable exercise of the power. On this aspect, the learned Judge (Kailasam, J.) has definitely found that no *mala fides* or colourable exercise of power could at all be inferred, from the facts of the record Since we are in agreement with him on this aspect, it is sufficient to be brief here, apart from referring to one or two authorities on the aspect of *mala fides*.

Sri Gokulakrishnan for the respondent-Municipal Council, has strenuously contended that the learned Judge is right in his view that the law imposed no obligation on the Municipal Council to transact business at meetings convened, apart from the obligation to hold a minimum number of meetings. He points out that there is no charge that the Municipal Council has not carried out its statutory functions under other provisions, which have been elaborately analysed by the learned Judge, and, in his view that he advances, there will be a clash between the requirements of the law and the Rules in the Municipal Manual, to which our attention has been drawn, if we infer a duty on the Municipal Council to transact business at the meetings convened. But, on a deeper scrutiny of the scheme of the Act and the Rules, and the requirements of the law, we are unable to agree As the learned Advocate-General has rightly stressed, there appears to be some misconception in this regard, for the provisions elaborately analysed by the learned Judge (Kailasam, J.), no doubt relate to statutory obligations under the Act but they are really functions which have to be performed *through* the decision of the Municipal Council at its meetings by the Executive of the Municipal Council In other words, the Municipal Council can only function by transacting business at its convened meetings, and there is no other mode by which this statutory body can function at all. Conceivably, all these functions could be perfectly carried out by the Executive Officers of a Municipal Council, and the Council nevertheless may totally default in meeting and transacting business at its meetings. Can it then be pretended that such a Municipal Council is functioning at all under the scheme of the Act? On the contrary, we regard section 25 read with Schedule III as clear and categorical, on this aspect Under section 25 of the Act, the Municipal Council is bound to observe the rules in Schedule III, and the first rule of Schedule III is that the Council

"shall meet . . for the transaction of business at least once in every month; upon such days and at such times as it may arrange and also at other times as often as a meeting shall be called by the Chairman" We may point out that rule 2 (2) empowers the Chairman to convene urgent meetings, and that the Municipal Council is bound to meet when it has been convened, because the business requires it, which may be urgent, and bound to transact business, except for good reasons We can envisage a Municipal Council which is so torn by faction or disorder that it is unable to meet and transact business, even though it purports to meet the minimum number of times, or, may be, on more numerous occasions It is difficult to see how such Municipal Council can be said to be functioning, as envisaged by the law

Sri Gokulakrishnan has placed reliance upon certain parts of the Municipal Manual, including rule 26 (*b*), which empowers the Chairman, in the case of disorder, to suspend the meeting. We are unable to see any conflict between this power invested in the Chairman and, the statutory duty of a Council to meet as convened and to transact business at the meetings No doubt, it is true that there is another group opposed to the Dravida Munnetra Kazhagam group, headed by a named individual, and that the disorder may well be due to some obstructive tactics on the part of this group, as alleged, but the order of supersession is aimed against the Council as a creature of the statute, and may be said to affect those members of the Council equally with the rest The law admits of the plain inference that the obligation to meet and transact business at the meetings is essential to the very functioning of the Council, and that this cannot be merely limited to the minimum number of meetings specified in rule 1 of Schedule III. Even with regard to the resolution on the Anti-Hindi agitation, it could very well be argued that the mischief lay, not so much in the passing of a resolution upon a quite irrelevant matter, but in the adjournment of the Council immediately thereafter, without the transaction of any business.

We are, therefore, unable to hold that these facts, with reference to the seven meetings which broke up in disorder without the transaction of business, are not relevant to the ingredients mentioned in section 41 (1) Indisputably, the charge with regard to the irregular appointment, however minor in itself it might be, is also relevant, as well as the charge that the Municipal Council passed a resolution on some totally extraneous matter, conceivably tinged with a political complexion. It is impossible not to feel that, in a great part of the judgment, the learned Judge (Kailasam, J) was really assessing the adequacy of this material on an objective test Certainly, we agree with him in thinking that, on this material, if an objective test were to be attempted, the impugned order of supersession could not be defended. The Municipal Council met sufficiently frequently, and transacted business at a number of meetings , so that, objectively viewed, the break-up in disorder of these seven meetings may not be any justification for the drastic step of supersession. Admittedly, the other two charges are quite minor ones Hence, if the satisfaction of the Court were relevant, the appeals would have to fail

But that is not the test I must re-emphasise that, in the context of this power, as embodied in the statute, so long as the quasi-judicial process and the principles of natural justice are adhered to, the satisfaction of the Court cannot be substituted for the satisfaction of Government that the ingredients in section 41 (1) were established. The wisdom or unwisdom of such a measure does not concern the Court. Certainly, the supersession is a drastic step, and it could very well be argued that the material adduced hardly furnished a justification for such a procedure, which would interfere with the democratic process of Local Self-Government, for as long a period as two years But that is a matter for the State, and it may even now be open to Government to reconsider whether this step is really justified, and essential in the public interest

Concerning the interpretation of the words "persistent default" certain very interesting arguments were adduced I think it is sufficient for me to state that I find the definition in the Shorter Oxford Dictionary to be the most lucid and satisfactory one. The word 'persist' comes from two roots, 'per' and 'sisters', to stand. It implies "To continue firmly or obstinately in a state, opinion, purpose,

or course of action, especially against opposition ". I have also referred to *Corpus Juris Secundum*, Volume 70, page 686, to Words and Phrases (Permanent Edition), Vol. 32, page 282 and Stroud's Judicial Dictionary, Vol. 3, page 2166, (1953) Edition. But, as far as I can gather, while contumacious perseverance, notwithstanding opposition or remonstrance, is the substance of the expression, nevertheless, it cannot be said that opposition or remonstrance is essential Upon any question of the interpretation of a statute, I would certainly agree that the Court has a right to interfere, and that the order of Government cannot be conclusive vide *Navinitprasad* v. *Ahmedabad Municipality*[1]. We can well conceive of a case where default is persistent, the consciousness of the obligation in respect of which the default occurs being taken for granted, and, nevertheless, the opposition or earlier remonstrance has not happened at all, and the power was validly exercised. Here again, I think that there is some confusion between the wisdom of the measure, particularly where there was no previous remonstrance, and the strict requirements of the law. *Rex* v. *Turner*[2] is an instance in which a Judge construed the word ' persistent ', as applying to an offence committed immediately after a man obtained discharge from prison. In *Promode Kumar* v *Jaman*[3], Bose, J., held that persistent default connoted that the default should be successive or repetitive, in spite of warning or opposition. But I am unable to hold that warning or opposition must be essentially present, and that, without the presence of this element, ' persistent default ' could not be established. In this context, I may add that our attention has also been drawn to two interesting decisions of Banerjee, J., on the test of subjective satisfaction with regard to an essentially administrative power; they are *N C. Jute Mills* v. *Finance Ministry*[4] and *Nani Gopal* v. *State of West Bengal*[5] But, with respect to the learned Judge, I am unable to agree that a distinction could be introduced with regard to the degree of subjective satisfaction, in the form of an opinion " which is lesser in degree than the self-confident opinion based on reasonable materials commonly known as objective opinion but is certainly greater in degree than the speculative view, which goes by the name of subjective satisfaction ". I must reiterate that, once it is conceded that relevant material was placed before Government, upon which Government came to the decision, the satisfaction of Government cannot be impugned on any objective *criteria*, or by substituting for it, the judgment of the Court

I must next deal with the very important point that the terms of the Government Order themselves show that extraneous matters or documents not disclosed to the Council, have not merely influenced the decision of Government, but have gone into the making of that decision Certainly, if that were true, the decision would have to be struck down, as not in conformity with the quasi-judicial procedure of section 41 (1-A), and with principles of natural justice But a close analysis of the record shows that the stand taken by Government in paragraph 17 of the counter-affidavit is perfectly justified. Actually, it was the Municipal Council that, in its reply, referred to the Inspection Report and the Administration Report, and claimed that there were no adverse comments therein on the working of the Council. The learned Advocate-General points out that, as the record shows, these Reports were communicated to the office of the Council. Though it may not be correct for Government to claim that the Municipal Council requested that Government may look into these Reports, the alleged absence of adverse comments in these Reports was relied on by the Municipal Council, and Government were, therefore, compelled in stating their grounds of supersession, to refer to the contents of these Reports, in paragraphs 10 and 11 of their Order. The observation of the Government " The, Collector's remarks clearly bring out the fact that the charges have been proved ", cannot be construed as an additional material upon which Government acted. That is to introduce a distinction between the Government and the Collector which as was pointed out by one of us during arguments, is quite illusory ' Government ' is an impersonal agency or concept, and would include all its administrative and secretariat officers The fact that Government had regard to reports of the Collector,

1 A.I R 1957 Bom 163
2 L R (1910) 1 K B 346
3 A I R 1955 N C U (Cal) 5591
4 A I R 1966 Cal 151
5 A I R 1966 Cal 167

means no more than that Government took counsel upon the formulated charges and the explanation of the Municipality, in the way that Government, thought best. Certainly, a Secretary might have made a confidential note on this file to the Minister, and that note might have influenced the Minister, but that is no relevant consideration, either for the Municipal Council or for the Court. Actually, the order of the Government proceeds entirely on the formulated charges, the explanation thereto, and a recorded finding upon each charge that, in the Government's view, the charge was established. It is after this part of the order that we have paragraphs 10 and 11, and the learned Judge (Kailasam, J.) himself was apparently not conscious of the distinction that I am making, when he observed that "the plea that the Government was not influenced by the remarks of the Collector cannot be accepted". Since the Collector is also a limb of the Government, this is, in effect, merely stating that the Government took counsel of *all* its concerned officers, and then came to the decision. There is *nothing to show that the decision itself* was based upon anything except the formulated charges, the explanation thereto, and the findings thereon. Actually, the record shows that certain averments against the Municipal Council existed in the Reports of the Collector made before the notice, but that Government eschewed them as not necessary. On this ground, the decision of the Government cannot be struck down.

We are left with the aspect of *mala fides*, upon which the following citations may be briefly referred to—*Pratap Singh* v. *The State of Punjab*[1], *C.S. Rowjee* v. *The State of Punjab*[2], *Kesari Mal* v. *The State*[3] and *Venkatachalam Iyer* v. *State of Madras*[4]. As their Lordships of the Supreme Court have pointed out, *mala fides* would include colourable exercise of the power, that is, an exercise of power which is ostensibly so, "but which is really a pretext, with an ulterior objective or for achieving some other end. Certainly, the fact that the Dravida Munnetra Kazhagam Party is the largest political group in this Municipal Council, might well have evoked a suspicion in the Chairman, or some of the persons affected, that the order of supersession had a political bias or motive. But it is for the party alleging *mala fides* to establish that element as a reasonable inference, on the facts and probabilities shown to exist; a mere allegation of *mala fides*, as not entirely improbable, will not do, and Courts have to take notice of the increasing trend to allege this sometimes with little or no evident substance. In the present matter, we have carefully gone through the respective affidavits of the Home Minister and the Minister for Rural Development and Local Administration, as well as the facts of a particular controversy with regard to a licence for an Exhibition by the Women and Children Hospital Improvement Committee. It is clear that the alleged remarks of the Home Minister at the Tirunelveli Public Meeting, were made after the issue of the 'show cause' notice, and might merely have reflected his knowledge of the fact that such a notice has been issued, based on certain reports of maladministration. The affidavit of the other Minister is explicit to the effect that he did not ask for the approval of any Councillor or Councillors of the Municipal Council for its supersession, and further, that he did not consult them in this regard. With regard to the controversy about the Exhibition, we find that the Chairman (Writ Petitioner in W.P. No. 1917 of 1966) as well as a leading member of the opposite group, were both concerned, and hence that there could be no question of *mala fides* at all. In brief, there is nothing to sustain this charge, except a speculation, apparently founded on the presumed inadequacy of the facts relied on for the order of supersession. The learned Advocate-General rightly stresses that in several Reports of the Collector, prior to the 'show cause' notice, this action had been suggested as desirable in the public interest, and hence that the element of political *mala fides* would seem to be excluded. We agree with the learned Judge on this aspect.

Upon this analysis, I am unable to see how the Court could, in exercise of its powers of judicial review, strike down the order of supersession. I would consequently allow the appeals and discharge the rule. In conclusion, I must certainly

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1. A.I.R. 1964 S.C. 72.
2. A.I.R. 1964 S.C. 962.
3. A.I.R. 1957 Raj. 284.
4. W.P. No. 938 of 1955.

reiterate my impression that the measure taken is drastic, in its possible repercussions affecting the democratic process of Local Self-Government in that area, for as long a period as two years; further, the basis of facts relied on, in justification of the measure, would appear to be relatively slender and inadequate, but it is entirely for the State to take such further action in this matter, as it deems fit, in the light of these impressions. No order as to costs.

Ramakrishnan, J—I had the advantage of perusing the judgment of my Lord the Chief Justice. While agreeing with the conclusion set forth in that judgment I wish to add the following:

The main points for our consideration in these appeals, arising from the findings of the learned Judge, are as follows.—

1. The failure to conduct seven of the meetings of the Council in an orderly manner (forming the subject-matter of 7 out of the 9 charges against the Municipal Council) would not be relevant material, for holding that the Municipal Council was not competent to perform or made persistent default in performing the duties imposed on it by law. The subject-matter of charges 4 and 7 relating to the appointment of an employee, without reference to the panel of names sent by the Employment Exchange, and the passing of resolution expressing sympathy for the victims of the Anti-Hindi agitation, would not constitute evidence to show that the Municipality acted in excess or abuse of its powers.

2. The State Government in directing the supersession of the Municipality took into account the reports of the Collector, sent to the Government before the charges were framed, and the remarks of the Collector on the explanation submitted by the Municipality, after the charges were framed, did not give an opportunity to the Municipality to controvert the data thus supplied, and, therefore, there was a contravention of the principles of natural justice.

3. The plea that the State Government was actuated by *mala fides* in superseding the Council. The finding of the learned Judge was that there was no such *mala fides*.

My Lord the Chief Justice, in his order has dealt with the third point at length, in considering the arguments of the learned Counsel for the respondent in the appeals before us, when he sought to support the order of the learned Judge, by inviting us to hold that there was *mala fides*. I fully concur in the views of my Lord the Chief Justice, and do not wish to add any remarks of my own.

On the first and second points mentioned above, the learned Judge (Kailasam, J) has held that the State Government, while exercising its powers under section 41 of the Madras District Municipalities Act (V of 1920), will be acting judicially. He has also held that the satisfaction of the State Government, reflected by the words "in their opinion" used in the language of section 41, must be construed in the light of well-known authorities, which it is not necessary to cite here, as the subjective satisfaction of the Government, there has been no challenge before us by the learned Advocate-General for the appellant, against this conclusion. The learned Counsel for the respondent argued that the failure of the Municipal Council to transact business at 7 meetings mentioned in 7 out of the 9 charges, was due to the obstructive tactics adopted by a handful of members of the Municipal Council, and that there are ample powers given to the Municipal Council, for keeping order at such meetings (*vide* Regulation 26 (*a*) and Regulation 26 (*b*) which give power to deal with disorderly councillors). Reference was also made to the successful termination of a much larger number of meetings of the Municipal Council, wherein business was transacted during the relevant period. It was, therefore, reiterated before us, that these data are not material data for supporting the finding against the Municipal Council. While it may be possible to take a broader view of the matter, and treat the circumstances of 7 meetings of the Council proving infructuous because of disorderly conduct of some members, as a minor defect in the working of the Council it cannot be held by this Court, in the exercise of its writ jurisdiction, that it would not

constitute relevant material at all on which the Government could act under section 41 of the Act. Equally, the irregular appointment referred to in charge 4, and the resolution on a collateral matter not pertaining to the business of the Council, forming the subject-matter of charge 7, could be viewed in a different light, and treated as venial faults. But here again, it will not be appropriate to substitute the opinion of this Court in the place of the opinion of the State Government, when it is free from dispute that what is relevant is the subjective satisfaction of the Government, and when we are upholding the finding of the trial Judge, about the absence of *mala fides*

Regarding point 2, the Municipality is a corporate body owing its existence to the statute, which also provides self-contained provisions for regulating its powers and duties as well as terminating its existence by supersession or dissolution Therefore, in, addition to the statutory procedure enacted in section 41, the Municipality, as a corporate body, cannot claim any other fundamental right or common-law right, for the purpose of an enquiry which leads to its dissolution or supersession While dealing with a Municipality against whom allegations are made regarding incompetency to function or persistent failure to perform its duties, the State Government is acting as an administrative authority, on whom the statute has enjoined the obligation to adopt a procedure which is quasi-judicial in its nature, during a stage of the enquiry, commencing from the formulation of the grounds for supersession, proceeding through the grant of a period of time to the Council to show cause, and ending with the consideration of the explanation or objections of the Council, if any. However, the statute provides no restrictions as to the manner in which the Government should be apprised of the data against the Council, before it commences to formulate the charges , nor has the statute prescribed any restriction as to the manner in which the State Government should consider the objections of the Municipality after those objections have been received in answer to the show cause notice. On the other hand, if the duty to supersede or dissolve is cast by the statute upon an individual Minister, the statute may also provide that, in considering the objections, the Minister should consult his own conscience without taking any extraneous counsel, before giving his decision, putting himself on a par with a judicial officer, dealing with a criminal or a civil matter. But in the present case, the authority to deal with the objections, is the Government in the abstract, and for considering the objections, it will be open to the Government to use its usual official machinery including the machinery of the Secretariat and the machinery of the local officer on the spot, the Collector, for helping it to arrive at its conclusion. There is nothing in the order of supersession passed by the Government in this case, to show that, while it has consulted the Collector after the objections were received, it had travelled beyond the charges and the explanation to the charges, before taking the decision to supersede. The Government notification in paragraph 11 contains the following remarks

> 'The Government have obtained the comments of the Collector on the replies given by the Municipal Council to the show cause notice The Collector's remarks clearly bring out the fact that the charges have been proved and that the functioning of the Municipal Administration has not at all been satisfactory "

We observe that the language cannot be considered to be very happy. But it is not conclusive to show that the Government surrendered its judgment or the exercise of its discretion in dealing with the charges, to the Collector, because in the earlier portion of the notification, while dealing with the charges one by one, a clear finding in respect of each of them has been arrived at by the Government, and recorded. In view of this, the action of the Government in obtaining the comments of the Collector on the replies given by the Municipal Council, must be treated as part of the administrative process involved, when the Government, after receipt of the objections of the Council, proceeded to deal with it. In this connection, the learned Advocate-General Sri Mohan Kumaramangalam appearing for the State drew our attention to the decision of the Court of Appeal in England in *Johnson & Co. v. Minister of Health*[1]. That case dealt with a compulsory purchase order by a local authority under the Housing Act of 1936 which gave the aggrieved owners of the

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1. (1947) 2 All E R. 395.

land a right to approach the Minister for relief, and the Minister under the statute could cause a public local enquiry to be held, consider any objections not withdrawn, the report of the person who held the enquiry and may then confirm the order with or without modification. Lord Greene, M.R., observed at page 399 of the report.

"But his (Minister's) functions are administrative functions subject only to the qualification that, at a particular stage and for a particular and limited purpose, there is superimposed on his administrative character a character which is loosely described as 'quasi-judicial' The (ultimate) decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections *vis-a-vis* the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue"

In the present case, however, the conclusion of the Government to supersede or not to supersede must be based purely on the subjective view that they take on the objections, and it will not be correct to draw a parallel from the English case above cited, for holding that the subsequent decision of the Government under section 41 of the Act should have no reference to the charges and the explanations, preceding it, but should be viewed only as a policy decision. *Johnson's case*[1], however, will provide an analogy, in the limited sense, for viewing the intermediate process of supplying the grounds and calling for objections, as amounting to a procedure of a quasi-judicial character, imposed by the statute on the Government as an administrative body, but giving it a certain freedom of discretion in the use of the appropriate official machinery for the purpose of taking its decision subjectively From this point of view, we are inclined to accept the argument advanced by the learned Advocate-General that there has been no violation of the obligatory requirements of the statute or contravention of the principles of natural justice in dealing with the objections of the Municipal Council to the charges.

At the conclusion of the appeals it was submitted before us that the period of two years for the supersession is the maximum period provided by section 41 of the Act, that the remaining life of the present Council, as constituted, will expire before that date, and that the order will amount in substance to the dissolution of the Municipal Council, which is a more drastic step than supersession, under the statute. It was urged that recent days have witnessed many an instance of democratic bodies in this country, at every level, finding themselves paralysed in their work by the obstructive tactics of a few members, and that such tactics have been dealt with by methods other than supersession, either because the law does not provide for that remedy, or because, where the statute has provided such a remedy the authorities had considered the fault to be venial. It was pressed on us that a remedy out of all proportion to the requirements of a given case is likely to lead to an unfavourable impression on the public mind, and even lead to allegations of *mala fides*, as has happened in this case. Our attention was also drawn to the provision in the statute itself, namely, section 41 (5), which gives the discretion to the Government to reconstitute a superseded Council even before the expiry of the period notified earlier by section 41 (1) of the Act. In our opinion, these submissions are relevant, and may be appropriately considered by the Government in due course, for mitigating the severity of the remedy now applied, seeing that the statute clearly gives them the discretion to do so.

V.K. *Appeals allowed*

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1. (1947) 2 All E.R. 395.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

P. K. Rajamani, Manager, Elementary School, Kammapatcheri ... *Petitioner**

v.

The Panchayat Union Council, Kadayanallur, represented by its Commissioner at Kadayanallur, Tirunelveli District ... *Respondent.*

Madras Panchayats Act (XXXV of 1958), section 65 (e)—Panchayat Union Council to make provision for opening and expansion of elementary schools—Conditions necessary to be observed—Rules for the grant of recognition and aid to elementary schools—Rule 4—Governments Notifications giving directions regarding opening of new elementary schools—Scope—Person running existing elementary school—Right to apply for issue of mandamus *restraining Panchayat Union from starting or running new school in contravention of the Rules and Notifications.*

Reading Section 65 (*e*) of the Madras Panchayats Act 1958, and the relevant notifications and rule 4 of the Rules for the grant of recognition and aid to elementary schools, it appears that the Panchayat Union Council of Kadayanallur in the instant case deliberately committed a breach not only of the provisions of the rule but also of the notifications in opening a new elementary school in the locality. Consultation of the local panchayat is required by the notification as it is for the local panchayat to decide whether they should have an elementary school. It is for the local panchayat to decide whether to have another school or not. In the absence of material to show that another elementary school is absolutely necessary and that the present elementary school is not adequately serving the needs of the school-going children, the writ of *mandamus* against the Panchayat Union Council, Kadayanallur restraining it from running another elementary school in the vicinity of an existing school has to be issued.

A person already running an existing elementary school in the locality has got every right to come to Court as an aggrieved party and ask for the issue of a writ of *mandamus* on the ground that there was breach of the rule, and notifications in opening another elementary school by the Panchayat Union in the instant case.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to call for the records connected with the starting of a feeder school at Kammapatcheri, Tenkasi Taluk, under the respondent's management and to issue a writ of *mandamus* directing the respondent to forbear from starting the said feeder school.

K. Kumarasami Pillai, for Petitioner.

T. R. Mani, for Respondent.

The Court made the following

ORDER.—This is a Writ Petition for the issue of a writ of *mandamus* directing the Panchayat Union Council, Kadayanallur, represented by its Commissioner at Kadayanallur to forbear from starting the feeder school at Kammapatcheri, Tenkasi Taluk, under its management.

The short facts that are necessary for the disposal of this Writ Petition are as follows. The petitioner, one Rajamani, started as early as 1941 an aided Elementary School at Kammapatcheri having Standards I to V for the total population of that village of 690. The school was recognised and the petitioner was getting aid from the Government. The school run by the petitioner is a brick-built one. While the petitioner is running the school, the Panchayat Union Council started another Elementary School for Standards I to III in improvised thatched sheds. The petitioner is aggrieved that the conduct of the Panchayat Union Council by opening an Elementary School is only due to enmity and not due to the convenience of the villagers. Therefore, the petitioner has filed the present petition for the issue of a

*W.P. No. 905 of 1963. 1st September, 1966.

writ of *mandamus* directing the Panchayat Union Council not to start the school. Along with the writ petition the petitioner has filed another petition for interim injunction restraining the respondent from opening the school Srinivasan, J., allowed both the schools to function, as the Panchayat Union Council had by that time started the proposed Elementary School and begun to admit children in that school This writ petition has come up before me for final hearing after a period of three years, and the learned Counsel for the petitioner contended before me that there are two Notifications issued by the Government, where it is specifically stated that the Panchayat Union Council should consult the local panchayats in the area before opening of new schools or new classes in existing schools and regarding the location of such schools, and that they could open new Elementary Schools in a locality, which has no school within a radius of one mile and which has a population of not less than 300. Admittedly, the school in question opened by the Panchayat Union Council to Kadayanallur, is within 40 yards of the institution belonging to the petitioner. This is a deliberate breach of the Rules for the grant of recognition and aid to Elementary Schools, committed by the Panchayat Union Council, Kadayanallur, and as such the petitioner has got every right to come to this Court for the issue of writ of *mandamus* directing the Panchayat Union Council to forbear from running the schools. Therefore, the only question for my consideration is whether the Panchayat Union Council has got a right to start another school of their own in spite of the fact that a private person is running an aided Elementary School in that locality Under section 65 (*e*) of the Madras Panchayats Act, 1958 it is the duty of a Panchayat Union Council, within the limits of its funds, to make reasonable provision for carrying out the requirements of the Panchayat Union in respect of the opening and maintenance and expansion or improvement of Elementary Schools, including the payment of grants to private managements in respect of Elementary Schools. It is also necessary to refer to rule 4 of the Rules for the grant of recognition and aid to Elementary Schools where it is provided that no new schools shall be permitted to be opened by a local authority in a locality which is adequately served by an aided school or schools already existing in the locality This rule must be read along with section 65 of the Madras Panchayats Act, 1958. In addition to these specific provisions there is also the notification of the Government which has been circulated to all gramasevaks, to the social education organizers, to all managers of aided Elementary Schools and to all Extension Officers, that the Panchayat Union Council should consult the local panchayats in the area before opening of new schools or new classes in existing schools and regarding the locating of such schools, and the Notification No. 47606-2-E 8-61 dated 30th June, 1961 that the Panchayat Union Council could open a new Elementary School in a locality which has no school within a radius of one mile and which has a population of not less than 300. I feel, reading section 65 of the Madras Panchayats Act, 1958 and the Notifications mentioned already and rule 4 of the Rules for the grant of recognition and aid to Elementary Schools, that the Panchayat Union Council, Kadayanallur, deliberately committed a breach not only of the provisions of the Rules but also of the Notifications mentioned already in starting a new Elementary School The learned Counsel for the respondent contended before me that even though there is the Notification of the Government which directs the Panchayat Union Council to consult the local panchayats in the area before opening new schools, it has no statutory force I agree with him. This Government Order must be read with the other Government Order Memorandum No 47606-2 E/8-61 dated 30th June, 1961 which has authorised the opening of a new Elementary School in a locality which has no school within a radius of one mile, and rule 4 of the Rules for the grant of recognition and aid to Elementary Schools. The purpose of the Notification of the Government, G.O Ms No. 1718 dated 19th June, 1961, which requires consultation of the local panchayats, is that it is for the local Panchayats to decide whether they should have an Elementary School or not Otherwise there would be an unseemly competition between the Panchayat Union Council and the persons who are already running an aided Elementary School It is also clear from the Notification of the Government Memorandum No. 47606-2 E 8-61 dated 30th June, 1961, that the proposed school should be in a locality which has no school within a radius

of one mile and which has a population of not less than 300 Here the population at the time of the starting of the Elementary School by the petitioner was 690. No doubt a school may be necessary. But it is for the local Panchayat to decide whether to have an additional Elementary School or not There is no material placed before me that another Elementary School is absolutely necessary and that the present Elementary School is not adequately serving the needs of the school-going children In these circumstances, the petitioner is entitled to a writ of *mandamus* directing the Panchayat Union Council, Kadayanallur, to forbear from running another Elementary School

The learned Counsel for the respondent contended before me that the petitioner is not the aggrieved person and as such he is not entitled to file a writ against the respondent Though there may be some force in the contention of the learned Counsel for the respondent, still it is clear that the petitioner is not fighting personally The question is whether an additional school is necessary and is permissible When the aided Elementary School of the petitioner is serving the school-going children of the locality, there is no necessity for another school in the same locality Therefore the petitioner has got every right to come to Court as an aggrieved party and to report that there was breach of the rule in opening another Elementary School. I find that the petitioner is entitled to obtain a writ of *mandamus* directing the Panchayat Union Council, Kadayanallur, to forbear from running the school. The Writ Petition is allowed There will be no order as to costs.

K S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K. S. VENKATARAMAN

V Mohamed Mahin — *Appellant**

v.

The Madras State Wakf Board — *Respondent*

Wakfs Act (XXIX of 1954), *section* 3 (1) (*iii*)—*Mussalman Wakf Validating Act (VI of* 1913), *section* 3—*Respective scope—Whether a deed is a wakf or* wakf-alal-aulad—*Determination of—Criterion—*Wakf-alal-aulad *validated under Mussalman Wakf Validating Act—If would be a* wakf-alal-aulad *under section* 3 (1) (*iii*) *of Wakfs Act also—Wakf deed providing for concurrent and immediate gift partly for maintenance of wakif's family and partly for charitable purposes—Nature of the wakf—Wakf Board's power to notify such wakf—"Family" in section* 3 (a) *of Act VI of* 1913—*Meaning of—Allocation of income between charitable and secular objects in the case of* wakf-alal-aulad—*Duty of Court*

Lighting of a mosque, payment for the *pesh imam* of the mosque and reading of Koran, performance of *gurubali* with sacrifice of one goat in the month of Bakrid and feeding the poor are recognised by Muslim law as pious, religious or charitable objects and a deed permanently dedicating properties for these purposes by a Muslim would clearly be a wakf under section 3 (1) of the Wakfs Act and is liable to be notified as a wakf by the Wakf Board

Where the material portion of a deed styled as wakf deed executed by a Hanafi Mussalman provided " I shall be entitled to enjoy the income of the following properties and after my lifetime, *M* . the son of my elder brother . .shall receive and enjoy the income from the properties and shall do the charities as specified below. After his lifetime his descendants shall enjoy the income from the properties and conduct the undermentioned charities. If he has no issues, his elder sister .. or her descendants shall receive and enjoy the income and out of the income do the undermentioned charities, that is to say, in accordance with the family custom, *barsia* and *pathia* (annual ceremony) of my father . and also feed a traveller every day The persons mentioned . will not be entitled to alienate the properties "

Held, the deed was a *wakf-alal-aulad* within the meaning of section 3 (1) (iii) of the Wakfs Act (XXIX of 1954) and will be a wakf for the purpose of the control of the Wakf Board to the extent to which the properties have been dedicated for the religious and charitable acts namely, annual ceremony of the father of the wakf and feeding of a traveller every day

The contention that there was no dedication of the properties to God which is the essence of a wakf, that there was only a gift of properties to *M* and the other persons mentioned in the deed with a charge for the religious and charitable objects and that therefore the deed was not valid as a wakf at all, is untenable In the first place the deed is styled as a wakf deed and the term must be known to every Muslim It definitely implies a transfer of ownership to God Secondly, there is no transfer of

*S A Nos 509 and 510 of 1963 — 16th March, 1966.

ownership of the properties to *M* He is only given a right to enjoy the income subject to the performance of the charities Further there is also a prohibition against any alienation which is consistent with a wakf and is inconsistent with a transfer of ownership to *M* The deed would thus really appear to be a *wakf-alal-aulad'*

Nor has the argument any force that the deed is not a *wakf-alal-aulad* but a wakf under the main definition of section 3 (1) of the Wakfs Act on the ground that the deed does not really confer any benefit on *M* or his descendants or *M*'s sister or her descendants but that they are only meant to be *mutavalis* for the performance of the religious and charitable acts mentioned in the deed If the intention was that the persons named were merely to receive the income and spend it wholly on the religious and charitable acts, the words " *enjoy the income* " which occurs in more than one place in the deed would have been omitted altogether The prohibition against alienation does not in any way invalidate the intention to benefit *M* and his descendants or *M*'s sister and her descendants That is a necessary feature in a *wakf-alal-aulad* because there must be a transfer of ownership of the corpus to God and there could be no question of alienation of the corpus

Nor can the deed be considered to be a wakf on the ground that the predominant intention of the wakif was to dedicate the properties only for religious or charitable purposes

The Wakfs Act (XXIX 1954) itself does not contain any definition of *wakf-alal-aulad* but whatever other tests may be suitable in any given case, it is not impermissible to assume that if a wakf will be a *wakf-alal-aulad* valid under section 3 of the Mussalman Wakf Validating Act VI of 1913, it will be a *wakf-alal-aulad* even for the purpose of Wakfs Act

In the present case there can be no doubt that the deed under consideration is a *wakf-alal-aulad* valid under section 3 of the Mussalman Wakf Validating Act and if so it would be a *wakf-aulal-aulad* for the purposes of Wakfs Act also

The argument that section 3 of the Mussalman Wakf Validating Act is intended to apply only to a case where the provision for the maintenance and support of the family, children or descendants is of the entire income and that therefore inasmuch as in the instant case there is a concurrent gift for the benefit of both the family of the wakif as well as for religious and charitable objects it would not be a *wakf-alal-aulad* within the meaning of section 3 of Act VI of 1913, would be unsound

While the section undoubtedly applies to cases where the whole of the income for the time being is intended for the maintenance and support of the family, children or descendants, with an ultimate express or implied reservation for the poor or other religious or charitable purposes, the section will also apply to a case where only part of the income for the time being is given for the benefit of the family, children or descendants and there is an immediate gift of the other part for religious or charitable purposes Where there is a concurrent and immediate gift for permanent charitable objects in a wakf created in favour of one's own family children or descendants it would warrant the implication of an ultimate trust for those objects on the failure of the family or descendants

The words " wholly or partially " in section 3 of the Mussalman Wakf Validating Act have reference to the income of the wakf property and not to the maintenance and support of the wakif and others

Syed Admad v *Julaina Bivi*, (1946) 2 M L J 335: I L R 1947 Mad 480, *Mahboob Bandi* v *Mahboob Hussain Khan*, A I R 1937 Oudh 454 and *Mohammad Sabir Ali* v *Tahir Ali*, A I R 1957 All. 94 I L R (1954) 2 All 556, relied on *Ali Bakhtiyar* v *Khondkar Altaf Hossain*, I L R 60 Cal 790 : A I R 1933 Cal 581 and *Tyebhoy v Collector of Ahmedabad*, A I R. 1944 Bom 91, dissented from. *Saiyed Shabbir Hussain* v *Sheik Ashiq Hussain*, I L R 4 Luck. 429, distinguished

The term " family " in section 3 (*a*) of the Mussalman Wakf Validating Act indicates persons descended from one common progenitor and having a common lineage In the instant case *M* and the settlor can trace their descent from one common progenitor Similarly *M*'s descendants and the settlor can trace their descent from one common progenitor So too *M*'s sister and her descendants and the settlor can trace their descent through one common progenitor. Hence *M* and his descendants as also *M*'s sister and her descendants will belong to the settlor's "family " within the meaning of section 3 (*a*) of Act VI of 1913 and therefore the deed in the present case cannot be said to be an invalid *wakf-alal-aulad* under Act VI of 1913 on the ground that they do not belong to the members of the settlor's family.

Quaere Whether the term *wakf-alal-aulad* used in section 3 (1) (iii) of the Wakfs Act must be confined to a wakf validated under section 3 of the Mussalman Wakf Validating Act or will take in some other kinds of *wakf-alal-aulad* also ?

Where a suit is filed for a declaration that a deed notified as wakf by the Wakf Board is not a wakf at all—(the Wakf Board contending that it is a wakf in its entirety)—and the Court finds that the deed is really a *wakf-alal-aulad*, it will be the duty of the Court to declare the true position and determine, in the suit itself, the extent to which the properties may be said to have been dedicated for the religious and charitable purposes mentioned It cannot be said that such a determination would be foreign to the scope of the suit

Appeals against the Decree of the Court of the Second Additional Subordinate Judge, Vellore, in Appeal Suit Nos. 437 and 436 of 1961, respectively preferred

against the Decree of the Court of the Additional District Munsif of Vellore in Original Suit No. 308 of 1960 and in Original Suit No. 716 of 1960 respectively

R. Gopalaswami Iyengar, N Sivamani and *M. V. Krishnan,* for Appellant

M. M. Ismail and *M. A Sathar Sayeed,* for Respondent

The Court delivered the following

JUDGMENT.—These Second Appeals have been filed by the plaintiff in two suits O S. No. 308 of 1960 and O S No 716 of 1960, which were tried together by the learned District Munsif of Vellore. The suit, O.S. No. 716 of 1960 concerns a wakf deed dated 7th October, 1940 (Exhibit A-32) executed by one Rukhia Bi Sahiba, and the suit, O S No 308 of 1960 concerns another wakf deed (Exhibit A-22) dated 4th August, 1941, executed by her. The Wakf Board constituted under the Wakfs Act (XXIX of 1954), notified them as wakfs under the Act. The plaintiff brought the suits for a declaration that the properties mentioned in the deeds are not wakf properties and not liable to be notified under the Act His contention was that Rukhia Bi did not really intend these documens to come into force and that they were not also valid as wakfs. The learned District Munsif held against him on both these points and dismissed the suits. The appeal preferred by the plaintiff to the learned Subordinate Judge also failed. Hence this further appeal.

Before proceeding further it would be convenient to give a free translation of the two deeds, in so far as they are material.

Exhibit-*A* 32, *dated 7th October,* 1940

" I executed a wakf deed on 5th May, 1938, but I am not satisfied with it Hence I am cancelling that, and executing this wakf deed That is to say, I myself shall enjoy the income of the undermentioned properties valued at Rs 2,000 for my lifetime and after my lifetime Mohamed Mahin Sahib (plaintiff), that is the son of my elder brother Abdul Rahim Sahib, shall conduct the following charities and other arrangements from out of the income of the said properties After him his descendants shall hereditarily conduct the above affairs In case he has no descendants, his elder sister Abibunniss's descendants shall manage If the above two have no heirs, Mahboob Begum Sahiba and Asia Begum Sahiba and their descendants shall manage That is to say, they shall take possession of the under-mentioned properties and out of the income therefrom shall do the charities and other affairs None of the above persons shall be entitled to sell or alienate the above properties The buildings mentioned below shall be rented out and out of the income, the residue, after payment of Union taxes and repairs, shall be utilised for the following charities ·

(1) Lighting of the mosque in Kaveripakkam, Kondapuram Road, as I have been hitherto doing and payment of not more than Rs 10 per month for the Pesh Imam of the mosque and reading of Koran ;

(2) Performance of *Gurubah* with sacrifice of one goat in the month of Bakrid every year in the name of myself and my husband

(3) Payment of Rs 10 per month for each of two persons, Dadamian and his wife, and Rs 25 annually for their clothing ,

(4) If there is any residue left out of the income, the poor have to be fed once every year

I have only a right to enjoy the income of the following properties during my lifetime , otherwise I will not be entitled to alienate them "

Exhibit A-22, *dated 4th August,* 1941

DEED OF WAKF

" I shall be entitled to enjoy the income of the following properties valued at Rs 2,000 and after my lifetime, Mohamed Mahin Sahib (plaintiff), son of my elder brother, Abdul Rahim Sahib shall receive and enjoy the income from the below-mentioned properties and shall do the charities as specified below. After his lifetime his descendants shall enjoy the income from the properties and conduct the undermentioned charities If he has no issues, his elder sister Habibunnisa Sahiba or her descendants shall receive and enjoy the income from the undermentioned properties and out of the income do the undermentioned charities, that is to say, in accordance with the family custom, *barsia* and *fathia* (annual ceremony) of my father Abdul Khader Sahib, and also feed a traveller every day The persons mentioned by me and their descendants shall conduct the charities from out of the income ; otherwise they will not be entitled to alienate the properties "

Rukhia Bi died on 27th April, 1952 Dadamian Sahib and his wife, mentioned in clause (3) of Exhibit A-32, died even in 1945. As stated above, the plaintiff is the brother's son of Rukhia Bi The Wakf Board issued notices (Exhibits A-5 and A-6) dated 9th February, 1959 to the plaintiff treating him as the Mutawalli in respect of the two wakfs. They called Exhibit A-32 as Rukhia Bi Wakf, and Exhibit A-22 as *wakf alal-aulad.*

At this stage it is necessary to refer to the definition of "wakf" contained in section 3 (1) of the Act as it stood before the Act was amended by Act XXXIV of 1964.

"*Section* 3 (1)—" Wakf" means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and, includes—

(i) a wakf by user,

(ii) Mashrut-ul-khidmat, and

(iii) a *wakf-alal- aulad* to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable,

and wakif means any person making such dedication"

As a result of Act XXXIV of 1964, sub-clause (ii) above was replaced by the following

"(ii) grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim law as pious, religious or charitable"

But that does not make any difference so far as the present case is concerned. The term *wakf-alal-aulad* has not been defined in the Act. But Sri M. M. Ismail, learned Counsel appearing for the Wakf Board, stated that the literal meaning of *aulad* is one's own descendants, and the meaning of *alal* is "on" and that meaning of *wakf-alal-aulad* is wakf for descendants. Actually the term has a wider import.

Now, I find from the plaint, that so far as the first deed, Exhibit A-32 is concerned, the only contention in the plaint was that it was not a valid wakf. So far as the second wakf deed, Exhibit A-22, is concerned, the two contentions were (i) that Rukhia Bi never intended to create a wakf, and (ii) that it was not a valid wakf. The resulting contention in respect of both the wakfs was that the properties remained as Rukhiabi's own absolute properties and that the plaintiff inherited them as her sole surviving heir. The learned District Munsif found that Exhibit A-32 was valid as a wakf. Regarding Exhibit A-22 he rejected the contention of the plaintiff that it was not acted upon. He also held that it was valid. Before the learend Subordinate Judge the contention that Exhibit A-22 was not acted upon does not appear to have been urged, and the only contention urged was that Exhibits A-32 and A-22 were not valid as wakfs.

It is easy to dispose of the appeal, S.A. No. 510 of 1963, relating to the earlier wakf, Exhibit A-32 (O.S. No. 716 of 1960 on the file of the District Munsif, and A.S. No. 436 of 1961 on the file of the Subordinate Judge, Vellore). As already stated Dadamian Sahib and his wife died in 1945 itself. The remaining objects mentioned in the deed are recognised by the Muslim law as pious, religious or charitable. There is a permanent dedication by Rukhia Bi of the properties for those purposes, and hence the deed is clearly a wakf deed, under the main definition in the Act. (Unless otherwise mentioned, the reference is only to Act XXIX of 1954) Sri Gopalaswami Iyengar, learned Counsel for the appellant was unable to advance really any useful arguments regarding Exhibit A-32. The decision of the Courts below dismissing the suit is clearly correct, and the appeal has got to be dismissed with costs, and it is hereby so dismissed with costs.

S. A. No. 509 of 1963. The main contention of Sri R. Gopalaswami Iyengar, learned Counsel for the appellant is that, Exhibit A-22 is not a valid wakf because, according to him, there is no dedication of the properties to God which is the essence of a wakf, and that the direction to conduct the charities would only amount to a charge on the properties. He says that there could be two types of deeds (*a*) giving a specific portion of the income to the relatives and the residue for charities and (*b*) giving a specific portion for charities and the residue to the relatives. He says that the first would be a wakf under section 3 of the Act, but not the second, because in the second the property itself is given only to the relatives with a charge for the charities, and therefore the transfer of ownership to God which is the essence of a wakf will be wanting. He urges that the expenses for the perfomance of the annual *barsia* and *fathia* ceremony of the father, and the feeding of a traveller every day could be easily ascertained and would constitute only a specified amount for the time being that consequently the amount to be spent for religious and charitable

objects was specified and the residue to be taken by the plaintiff or the other beneficiaries was indefinite, and therefore there was no wakf at all and there was only a gift of the properties to the plaintiff and the other persons with a charge for the religious and charitable objects. He refers to some of the decided cases on the point *viz.*, *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*[1], *Har Narayan* v *Surja Kunwari*[2]; *Thiruvengadamudayanaiya* v *Narasimhaswamiaiya*[3], *Adaikappa Chettiar* v *Chandrasekhara Thevar*[4], and pages 157 to 164 of Mukerjee's Hindu Law of Religious and Charitable Trusts, Second Edition. He relies, in particular, on the decision in *Harnarayan* v *Surja Kunwari*[2], dealing with a Hindu will Their Lordships of the Privy Council observed :

" The question whether the idol itself shall be considered the true beneficiary, subject to a charge, in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will "

Mr. Gopalaswami Iyengar strongly relies upon the decision of the Privy Council in *Adaikappa Chettiar* v *Chandrasekhara Thevar*[4] There the question arose under the Agriculturists Relief Act (Madras Act IV of 1938) This in turn depended upon the question whether the plaintiff had a beneficial interest in certain villages or whether those villages were wholly dedicated to charities (vide page 515). That in turn depended upon the construction of a certain compromise Clause (6) of the compromise provided that the plaintiff shall, for the performance of free feeding *etc*, in the chatram which she was running at Ramnad, for ever enjoy the villages. Their Lordships of the Privy Council, differing from the High Court, held that the four villages were to belong to the plaintiff, but charged with the obligation of maintaining the charity which she had theretofore carried on They observed:

" The words do not appear apt to impose a duty upon the plaintiff of devoting to charity the whole of the income of the villages however much it might exceed the requirements of the charity in fact maintained by her. There is, no doubt, force in the observation made by the High Court, that, if a donor was making a gift of property burdened with the performance of a charity, one would expect to find that the charity was to be conducted according to a fixed " dittam " or standard of expenses, after meeting which the surplus income was to be enjoyed by the donee But it appears to be a sufficient answer to this point that the nature of the charity itself supplied a sufficient standard The maintenance of a choultry for the feeding of travelling pilgrims would normally require a sum which varied from time to time and could not easily be defined in the terms of so many rupees a year no more and no less It appears to their Lordships in accordance both with the probabilities of the case and with the language of the document to conclude that, an estimate being made of the probable expenses of the charity and of the income of the villages, an appropriation was upon the division of the zamindari made to the plaintiff which would enable her to carry on the charity but would leave her free to retain for her own use any surplus after that purpose had been satisfied The alternative view is one that would involve a cypres application of the surplus to some other charitable purpose in the event of the income exceeding the needs of the particular charity In the circumstances of the case, there seems to be little justification for ascribing to the parties a general charitable intention which alone would justify such an application "

Mr. Gopalaswami Iyengar urges, on the above authority, that in this case also the expenses of the annual ceremony of the father of Rukhia Bi, and the expenses of feeding a traveller every day could be ascertained and would merely constitute a charge

While the submission of Sri M M Ismail, learned Counsel appearing for the Wakf Board, is that such an argument was not open at all to the appellant on the pleadings in the plaint and that no such specific case was put forward there, it must be noticed that the plaint says that the deed was not valid as a wakf and from that point of view it is open to Sri Gopalaswami Iyengar to contend that, as a matter of construction, there is no transfer of ownership to God and that only a charge was created for the charities But, on the merits, I am unable to accept the contention of Sri Gopalaswami Iyengar. In the first place, the deed is styled as a wakf deed and the term must be known to every Muslim It definitely implies a transfer of ownership to God. Secondly, there is no transfer of ownership of the properties

1. 8 M I.A 66
2. I L R 43 All 291
3. (1941) 1 M L J 488
4. L R 74 I A 264 (1948) 1 M L J 41 : I L R 1948 Mad 505 at 518

to the plaintiff. He is only given a right to enjoy the income subject to the performance of the charities. Further, there is also a prohibition against any alienation which is consistent with a wakf and is inconsistent with a transfer of ownership to the plaintiff The deed would really appear to be a *wakf-alal-aulad* within the meaning of Act XXIX of 1954.

Sri Ismail has, however, put forward some arguments that it will not be a *wakf-alal-aulad*, but will be a wakf under the main definition in Act XXIX of 1954 It will be necessary to consider that submission in some detail later But, before doing so, I shall refer to a few further submissions made by Sri Gopalaswami Iyengar .

Sri Gopalaswami Iyengar concedes that the performance of the annual *barsia* and *fathia* for the father is a valid object of a wakf. (Vide the decision in *Abdul Sattar Ismail* v. *Abdul Hamid Sait*[1], following *Ramanathan Chettiar* v *Veda Levvai Marakayar*[2], and *Kunhankutty* v. *Ahmad Musaliar*[3] He also concedes that feeding of a traveller every day is a charitable purpose But he contends that the provision in the deed in favour of the plaintiff and his descendants and, failing that, the plaintiff's sister and her descendants, will not be a purpose recognised by the Muslim law as pious, religious or charitable. In this connection, he refers to the Mussalman Wakf Validating Act, VI of 1913 It is well known that that Act was passed in order to validate certain wakfs which, according to the decisions of the Privy Council, in particular the decision in *Abdul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry*[4], would be invalid According to the Privy Council decision, a deed tying up property for the benefit of relatives of the settlor with only an illusory or remote provision for charity, was not a valid wakf Since this decision was contrary to the ideas of Mussalmans on the point, the Mussalman Wakf Validating Act, VI of 1913, was passed It is necessary to refer to some portions of the Act for elucidating the argument of Sri Gopalaswami Iyengar ·

Section 2 (1) " Wakf " means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable

Section 3 It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law for the following among other purposes —

(*a*) for the maintenance and support wholly or partially of his family, children or descendants, and

(*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Section 4 —No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf "

Sri Gopalaswami Iyengar recognised that Exhibit A-22 might be a lawful wakf under the provisions of section 3 (*a*) of the Act VI of 1913 in so far as it provided for the maintenance and support partially of the family of Rukhia Bi, but his argument was that even so it would not follow that the maintenance and support of the family, children or descendants of the settlor would be a purpose recognised by the Mussalman law as religious, pious or charitable In support of this argument he pointed out that section 3 itself showed that, but for that section, provision for the maintenance and support of the family, children or descendants would not be a purpose recognised by the Mussalman law as religious, pious or charitable and that was why it enacted that in all other respects the deed must be in accordance with the provisions of Mussalman law and that the ultimate benefit in such cases must be expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

1 (1944) 2 M L J 92 at 100.
2 (1916) L R 44 I A 21 32 M L J 101 I L.R. 40 Mad 116 (P C)
3 (1934) 68 M L J 107 I L.R 58 Mad 204.
4 (1894) 22 I A 76.

He urged that it was really unnecessary to elaborate that point further because of two pronouncements of the Supreme Court to that effect, namely, *Mohammad Ismail* v. *Sabir Ali*[1], and *Fazlul Rabbi Pradhan* v *State of West Bengal*[2] In *Mohammad Ismail* v. *Sabir Ali*[1], the question was whether a *wakf-alal-aulad* validated by virtue of section 3 of Act VI of 1913 could be considered to be a transfer for religious and charitable purposes within the meaning of section 18 of the Oudh Estates Act, I of 1869 Their Lordships observed, that, even though it might be valid as a wakf under section 3 of Act VI of 1913, the provision for family, children or descendants would not be a religious or charitable purpose, as the term is normally understood. They observed

> " This is made clear by the proviso to section 3 which provides that the ultimate benefit in such a case must be for religious or charitable purpose The proviso would have been unnecessary if the purpose of a *wakf-alal-aulad* was recognised as religious or charitable by this law The same in our opinion will follow from the provision in section 4 "

Similarly, in *Fazlul Rabbi Pradhan* v. *State of West Bengal*[2], their Lordships pointed out that a private gift to one's own self or kith and kin might be a valid wakf under Act VI of 1913, but it would not be exclusively for a purpose which was religious or charitable so as to be exempt from the operation of the West Bengal Estates Acquisition Act (I of 1954).

But all this argument of Sri Gopalaswami Iyengar would only lead up to this point, namely, that Exhibit A-22, in so far as it makes provision for the relatives of the settlor, will not be wakf under the main definition in Act XXIX of 1954. But these submissions do not touch the point that the deed may yet be, as indeed it seems to me it is, a *wakf-alal-aulad*, and would therefore be a wakf under Act XXIX of 1954 to the extent to which the property is dedicated for the two purposes (annual ceremony of the father of the wakif and feeding of a traveller every day), which are recognised by the Mussalman law as pious, religious or charitable.

It therefore only remains to deal with the contention of Sri M.M. Ismail that Exhibit A-22 is not a *wakf-alal-aulad* at all under the definition of "wakf" in Act XXIX of 1954, but is a wakf under the main definition. His primary argument is that Exhibit A-22 does not really confer any benefit on the plaintiff or his descendants or the plaintiff's sister or her descendants, that they are only meant to be mutavallis for the performance of the religious and charitable acts mentioned in the deed, and that the entire income was to be utilised only for those purposes. His secondary contention is that, even assuming for the sake of argument that Exhibit A-22 intended some benefit for the plaintiff and his decendants or the plaintiff's sister and her descendants, the deed would still fall under the main definition of wakf, and would not be a *wakf-alal-aulad.* The point of the learned Counsel is that the test for determining whether a deed is a wakf under the main definition, or a *wakf-alal-aulad* under clause (iii) of section 3 (1) is what was the predominant intention of the settlor, if the predominat intention was to dedicate the properties for purposes recognised by Mussalman law as pious, religious or charitable, it would be a wakf under the main definition, even though incidentally some benefit was intended for the relatives of the settlor as well Similarly, if the predominant intention was to benefit the relatives of the settlor, and incidentally to give some thing for purposes recognised by Mussalman law as pious, religious or charitable, it will be a *wakf-alal-aulad* for the purposes of the Act. On these premises he urges that Exhibit A-22 had the predominant intention of dedicating the properties for purposes recognised by the Mussalman law as religious or charitable and would therefore be a wakf within the main definition. In support of this contention he relies, in particular, on the decision of a Bench of this Court in *Ibrahim Sahib's Trust* v. *State Wakf Board*[3]. In that case it was found that the unmistakable intention of the testator was to dedicate the property absolutely for wakf. But there was a provision for payment of a small amount of paddy and cash to two relatives of the testator for their lifetime

1 A.I.R. 1962 S.C. 1722 at 1729.
2 (1965) 2 S.C.J. 833 at 838
3 (1965) 1 M.L.J. 214.

The Wakf Board notified the endowment as a wakf under the Act That was challenged by a suit in the District Court and in further appeal to this Court. It was held that the document taken as a whole substantially dedicated the properties to charities with a charge in favour of the two relatives of a small extent of the income for the duration of their lives, and that consequently the deed would fall under the main definition of wakf amenable to the jurisdiction of the Wakf Board, but that the Board was under a duty to make the payments to the specified relatives. On behalf of the appellant trustee it was urged that before the notification could be declared as valid, there should be an allocation of the income between the charitable and secular purposes, and that the notification should relate only to the former. This contention proceeded on the footing that the deed was a *wakf-alal-aulad* within the meaning of the Act This contention was repelled on the ground that the dedication in question was an absolute wakf and that the donees had only a charge on the properties. It was further observed

" Further there is no specific provision in the Wakf Act for conferring any authority on the Wakf Board to allocate the income between the charitable and secular objects, where the deed of foundation partakes of both the characters In such a case the proper course will be to frame a scheme regulating the expenses between the diverse objects of the wakf We are therefore unable to accept the contention of the appellant that before a notification can be made under section 5 (2) of the Act, there should be an allocation of the income from the wakf properties between the charitable and secular objects "

Founding on these observations, the learned Counsel urges that, if the Court accepts his contention that Exhibit A-22 is a wakf under the main definition, the Board will be entitled to supervise the management of the wakf under the main definition, subject, however, to making provision for the relatives mentioned in Exhibit A-22. But if, on the other hand, the Court should find that Exhibit A-22 is a *walkf-alal-aulad*, the Board could still notify it, but a scheme may have to be formulated regulating the expenses between the charitable and the secular purposes. The learned Counsel submits further that the scope of the present suit would not call for a consideration of any such scheme or any allocation between the charitable and secular purposes, because, according to the learned Counsel, the only basis of the plaint was that Exhibit A-22 was not intended to come into force at all, and that contention having failed, there is nothing further left for the Court except to dismiss the suit

The learned Counsel suggested another possible criterion for determining whether Exhibit A-22 would be a *wakf-alal-aulad* under section 3 (1) (iii) of Act XXIX of 1954. The submission of the learned Counsel is that, though Act XXIX of 1954 has not referred to the Mussalman Wakf Validating Act, VI of 1913, it may have been the intention of the Legislature to refer to a wakf validated by that Act (under section 3 thereof) as a *wakf-alal-aulad*, when it referred to a *wakf-alal-aulad*, under section 3 (1) (iii) of Act XXIX of 1954 The further submission of Sri Ismail is that, even according to this criterion, Exhibit A-22 would not be a valid *wakf-alal-aulad.* He puts this on two grounds Firstly, he said that according to some decisions, Exhibit A-22 will not fall under section 3 of Act VI of 1913 because there is a concurrent gift to religious and charitable purposes, and that section 3 of Act VI of 1913 would apply only to cases where for the time being the whole of the income from the endowed properties is given for the family, children or descendants of the settlor According to the learned Counsel these decisions proceed on the footing that, since the proviso to section 3 of Act VI of 1913 speaks of the ultimate benefit in such cases being expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character, section 3 will not apply where there is immediate benefit for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

The second way in which Sri Ismail contends that Exhibit A-22 cannot claim validity as *wakf-alal-aulad* under section 3 of the Act VI of 1913 is that, while the plaintiff or the plaintiff's sister may answer the description of belonging to the family of the settlor within the meaning of section 3 (*a*) of Act VI of 1913, the descendants of the plaintiff or the decendants of the plaintiff's sister cannot answer the descrip-

tion of the family of the settlor, and, of course, they will not be the children or descendants of the settlor.

The further submission of Sri Ismail is that, on this alternative criterion, if Exhibit A-22 is not a valid *wakf-alal-aulad* under section 3 of Act VI of 1913, it will not be a valid *wakf-alal-aulad* under section 3 (1) (*iii*) of Act XXIX of 1954 and will be a wakf under the main definition under section 3 (1) of Act XXIX of 1954

These are undoubtedly able arguments, but I am unable to accept them The primary contention of the learned Counsel that no benefit at all is intended under Exhibit A-22 is based on the submission that the only indication of a benefit to the relatives is the use of the word " அனுபவித்துக்கொண்டு " (enjoy the income) that the mere use of that word is not sufficient and that the deed taken as a whole cannot be taken to confer any beneficial interest at all on the plaintiff or his descendants or the plaintiffs sister or her descendants. The learned Counsel urges that there are no express words directly granting an interest in favour of the plaintiff or his descendants or the plaintiff's sister or her descendants, and he says, in contrast to this, that there are express words of grant for religious and charitable purposes, and he further emphasises the last sentence that the plaintiff and his descendants or the plaintiff's sister and her descendants should conduct the religious and charitable acts only from the income, and should not alienate the corpus He submits that this is an indication that the entire income should be utilised by the plaintiff and his descendants or the plaintiff's sister and her descendants for the religious and charitable acts

Apart from these submissions, which are based on the words of Exhibit A-22 itself without reference to the surrounding circumstances under which the deed was executed, the learned Counsel refers also to those surrounding circumstances in support of his contention He points out that according to the evidence of the plaintiff, the properties of Rukhia Bi in 1930 were worth about four to five lakhs of rupees, in other words, she was a very rich woman, and the properties settled under Exhibit A-22 have been valued only at Rs. 2,000 and the construction which would be more in keeping with her status and which would take account of the smallness of the properties settled under Exhibit A-22 in relation to the vastness of the properties would be a construction that she intended the entire income from the properties settled under Exhibit A-22 to be utilised for the performance of the religious and charitable acts mentioned in it, and did not intend any portion thereof to be taken by the plaintiff and his descendants or the plaintiff's sister and her descendants, and that those persons have been referred to merely as persons who should receive the income and conduct the charities without appropriating any portion thereof for themselves

These submissions, however, fail to give effcet to the use of the word " அனுபவித்துக்கொண்டு" (enjoy the income) in more than one place of the deed If the intention was that the persons named were merely to receive the income and spend it wholly on the religious and charitable acts, the word "அனுபவித்துககொண்டு" (enjoy the income) would have been omitted altogether In this respect, we haven the key in the earlier deed Exhibit A-32 of the settler herself for the interpretation of the later deed, Exhibit A-22 In the earlier deed, the term " அனுபவித்துக்கொண்டு " (enjoy the income) is entitrely absent in relation to the plaintiff or his descendants or the other persons named, in the event of their failure It may be noted that Exhibit A-32 says that the settlor herself had the right to enjoy the income from the properties during her lifetime But such a word (enjoyment) is not used in respect of the plaintiff and his descendants or the other persons Thus Exhibit A-32 clearly shows that the plaintiff and his descendants or the other persons were to have no beneficial interest in the income from the properties settled thereunder Exhibit A-22, written just within a year of Exhibit A-32, is in sharp contrast to Exhibit A-32 in this respect, because Exhibit A-22 has used the term " அனுபவித்துக்கொண்டு " (enjoy the income) in more than one place. The prohibition against alienation does not in any way invalidate the intention to

benefit the plaintiff and his descendants or the plaintiff's sister and her descendants. That is a necessary feature in a *wakf-alal-aulad*, because there must be a transfer of ownership of the corpus to God and there could be no question of the alienation of the corpus.

We must therefore proceed on the footing that Exhibit A-22 is a settlement both for the benefit of the persons named therein and the religious and charitable acts mentioned therein. If so, it seems to me that it will plainly be a *wakf-alal-aulad* within the meaning of section 3 (1) (*iii*) of Act XXIX of 1954, and it will be a wakf for the purpose of the control of the Wakf Board to the extent to which the properties have been dedicated for the religious and charitable acts It will be for the Court to determine that extent It seems to me that this is a simple way of applying the Act in relation to a document like Exhibit A-22. The Act itself does not contain any definition of *wakf-alal-aulad*, but whatever other tests may be suitable in any given case, it is not impermissible to assume that, if a wakf will be a *wakf-alal-aulad* valid under section 3 of the Mussalman Wakf Validating Act, VI of 1915, it will be a *wakf-alal-aulad* even for purposes of Act XXIX of 1954 It has been noticed that Sri M. M. Ismail himself has suggested this criterion. So far as Exhibit A-22 is concerned, I have no doubt that it is a *wakf-alal-aulad* valid under section 3 of Act VI of 1913 The relevant portions of sections 3 and 4 of that Act have already been quoted.

Now, there is no difficulty so far as the provision during the life time of the settlor is concerned It is valid under section 3 (*b*) of Act VI of 1913. As for the provision in favour of the plaintiff and his descendants or the plaintiff's sister and her descendants it will be valid under section 3 (*a*) of Act VI of 1913, because the relevant portion of that clause is " for the maintenance and support wholly or partially of his family, children or descendants " The provision in Exhibit A-22 will be one for the maintenance and support partially of the settlor's family. Further, the proviso to section 3 is also satisfied So far as the portion to be spent for the religious and charitable acts is concerned, there is an immediate benefit, and so far as there is provision for the plaintiff and his descendants or for the plaintiff's sister and her descendants, it can be held, as a matter of construction of Exhibit A-22, that the ultimate benefit even in respect of that part has been impliedly reserved for the religious and charitable acts mentioned in the deed We cannot assume that there will be a perpetual line of the descendants of the plaintiff or the descendants of the plaintiff's sister. Indeed, we can proceed on tho footing that the line of descendants may come to an end ultimately, in any case, section 4 of Act VI of 1913 can validate it The matter is really concluded by the decision of a Bench of this Court in *Syed Ahmad* v *Julaina Bivi*[1].

In that case the income of the properties settled under the wakf deed was about Rs. 1,500 and the provision for charities cost only Rs. 160 per annum and the remainder was intended for the maintenance of the wakif's family and descendants. It was held that it was a valid wakf under section 3 of Act VI of 1913. So far as some of the items of properties (the shop in item 2 in Schedule A and the lands in Schedule E) were concerned, the deed provided that the wife of the wakif should enjoy them during her life time and thereafter the properties should be added to the charity referred to in Schedule D But in respect of the other properties, from out of which benefit was given to the children and the descendants of the wakif, there was no express reservation of the ultimate benefit on failure of the children and descendants The question was whether such a reservation could be implied from the terms of the instrument read in the light of the surrounding circumstances The learned Judges held that the use of the term " wakf " by itself might be taken to imply an ultimate dedication for the poor or for other unfailing charitable object, and further, where there was a concurrent and immediate gift for permanent charitable objects in a wakf created in favour of one's own children and descendants, it would warrant the implication of an ultimate, trust, for those objects on the failure of the descendants (Vide pages 496 and 497 of the report) The learned Judges

1 (1946) 2 M L J 335 I L R 1947 Mad 480

quoted with approval the following observations of Sulaiman, C J delivering the judgment of the Court, in *Mt Ruqia Begum* v *Suraj Mal*[1]

"Where the wakif has indicated his intention that his object is to benefit his family, and also religious, pious or charitable purposes, it can be implied that there is an ultimate reservation for such purposes, particularly so when he has provided that a part of the income should be applied to such purposes during his own lifetime If one object, namely, the maintenance of his descendants, fails, there is no reason why the other object should also fail and no reason whatsoever why the whole income should not be devoted to the remaining object as indicated"

Syed Ahmed's case[2], was followed in *Thanga Mayil Ammal* v *Fathima*[3], where the income of the properties was Rs 150 per annum and the amount to be spent on religious objects was only about Rs 5 and the rest was to be taken by the trustees after the wakifs life time, namely, his daughters, and his descendants.

Sir M. M. Ismail, however, has put forward two lines of argument to support the contention that Exhibit A-22 will not be valid under section 3 of Act VI of 1913. The first line of argument is that, according to some decisions, the existence of the proviso to section 3 of Act VI of 1913, would indicate that the section was intended to apply only to a case where the provisions for the maintenance and support of the family, children and descendants is of the entire income According to these decisions, where there is a concurrent gift for the benefit of individuals and for religious and charitable objects it could not be said that the benefit for the poor or religious or charitable purposes is ultimate within the meaning of the proviso. This reasoning is, however, incorrect While the section undoubtedly applies to cases where the whole of the income for the time being is intended for the maintenance and support of the family, children or descendants, with an ultimate express or implied reservation for the poor or other religious or charitable purposes, the section will also apply to a case where only part of the income for the time being is given for the benefit of the family, children or descendants, and there is an immediate gift of the other part for religious or charitable purposes. We have seen that, according to the decision in *Syed Ahmad* v *Julaina Bivi*[2], an ultimate benefit for religious or charitable purposes can be implied in respect of a part of the income which is for the time being intended for the maintenance and support of the family, children or descendants. The words 'for the maintenance and support wholly or partially of the family, children or descendents' in section 3 of Act VI of 1913 are apt to cover both a case where the entire income for the time being is intended for the maintenance and support of the family, children or descendants, and also a case where only part of the income for the time being is intended for the family children or descendants, the other part being intended immediately for the benefit of religious and charitable purposes The first kind of cases will be covered by the word 'wholly' in section 3 (*a*) and the second kind of cases will be covered by the word 'partially.' That seems to be the only reasonable and sensible way of interpreting the Act If, even in a case where the entire income for the time being is given for the maintenance and support of the family, children or descendants, the deed of wakf will be valid under section 3 on the ground that an ultimate benefit for the poor or for other religious or charitable purposes can be implied, that is all the more reason why it should be held that section 3 intended to validate also a wakf deed where only part of the income for the time being is given for the maintenance and support of the family, children or descendants, the other part being given immediately for religious or charitable objects. There can be no reason, on the principle of the matter, as to why the Act, which is assumed to validate the first kind of wakf, should be held not to validate the second kind of wakf. The principle of the matter demands just the opposite conclusion.

The above views necessarily follow from the Bench decision in *Syed Ahmad* v. *Julaina Bivi*[2] There is also a direct decision of a Bench of the Oudh Chief Court in *Mahboob Bandi* v. *Mahboob Hussain Khan*[4]. The question for decision in that case was whether a particular wakf, which partly provided for the maintenance and

1. A I R. 1936 All 404
2 (1946) 2 M L J 335 I L R 1947 Mad 480
3 1960 M L J (Crl) 97 (1960) 1 M L J. 94 I L R 1960 Mad 481
4 A I R 1937 Oudh 454.

support of the wakif's wife, children and descendants, and partly for religious and charitable objects, was excluded from the operation of the Mussalman Wakf Act XLII of 1923, on the ground that the wakf fell under section 3 of the Mussalman Wakf Validating Act (VI of 1913) Act XLII of 1923 applied to a wakf as defined therein, and the definition was this .

" 'Wakf' means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in section 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants "

Under section 3 (1) of Act XLII of 1923 the mutawalli of a wakf governed by the Act was required to furnish a statement to the Court containing the prescribed particulars in respect of the wakf property within six months from the commencement of the Act Sub-section (3) of section 3 is important, and it says

" Where

(*a*) a wakf is created after the commencement of this Act, or (*b*) in the case of a wakf such as is described in section 3 of the Wakf Validating Act, 1913, the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to any benefit thereunder,

the statement referred to in sub-section (1) shall be furnished, in the case referred to in clause (*a*) within six months of the date on which the wakf is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in clause (*b*), within six months of the date of the death of the person entitled to such benefit as aforesaid, or of the last survivor of any such persons, as the case may be "

It will be seen from this that in the case of a wakf described in section 3 of the Mussalman Wakf Validating Act VI of 1913, where the benefit is, for the time being, claimable by the wakif or by any of his family or descendants, the statement under Act XLII of 1293 is not required to be furnished within six months of the commencement of the Act, but only within six months of the death of the person entitled to the benefit or the last survivor of any such persons The reasons presumably why the obligation of the mutawali to furnish a statement is postponed in the case of a wakf described in section 3 of Act VI of 1913 seem to be two-fold, (*i*) where the beneficiary is the family or descendants, the Legislature did not want to interfere in that private wakf, and (*ii*) the members of the family or descendants benefited by the wakf could be expected to have sufficient control over the mutawalli and would not require protection from the Legislature under Act XLII of 1923. Act XLII of 1923 is, however, intended to apply in respect of other wakfs, even though the wakf is not entirely for public purposes, and some private individuals, who are not members of the family or descendants of the settlor, are also the beneficiaries. Such beneficiaries are entitled under the Act to apply to the Court for directing the mutawalli to furnish further particulars

In *Mahboob Bandi* v *Mahboob Hussain Khan*[1], the mutawalli contended that he was not bound to furnish the statement and give further particulars under Act XLII of 1923 because, according to him, the wakf was saved from the operation of the Act under the definition. The wakf was one created, among other purposes, for the maintenance and support of the wakif's wife, children and descendants, and therefore, turning to the definition in Act XLII of 1923, some benefit was for the time being claimable by the wakif's wife and descendants, and therefore the wakf was excluded from the operation of Act XLII of 1923 This contention was accepted by the Bench It was however argued by the learned Counsel for the person who made the application against the mutawalli that only those wakfs could come under Act VI of 1913 which were made wholly or mainly for the maintenance and support of the wakif's family, children or descendants, but that the wakf in question being mainly for religious and charitable purposes and not mainly for the maintenance and support of the wakif's family, could not come under Act VI of 1913, and was consequently not exempt from the operation of Act XLII of 1923 This argument was repelled by the learned Judges, observing

1 A I R 1937 Oudh 454

"We are unable to accept this argument as we find nothing in section 3 of Act VI of 1913 to justify the view that wakfs which are partly for the maintenance and support of the wakif's family and partly for religious and charitable purposes, are excluded from the provisions of that section The learned Counsel places great reliance on the Full Bench case in *Sayyed Shabbir Hussain* v *Shaikh Ashiq Hussain*[1], but the question for decision in that case was whether the Charitable and Religious Trusts Act (XIV of 1920) applies to the cases of mixed wakfs or trusts where a portion of the benefit is allotted for private purposes and a portion for public purposes, or whether it applies only to those cases where the entire benefit is allotted for public purposes No doubt, the learned Judges remarked in passing that a wakf which is partly private and partly public is governed by Act XLII of 1923, but in view of the questions for decision before the learned Judges, this remark can only be regarded as an *obiter dictum* The view we have taken is supported by section 3 (3) (*b*) of Act XLII of 1923, which lays down that

'Where in the case of a wakf such as is described in section 3 Wakf Validating Act VI of 1913, the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder, the statement referred to in sub-section (1) shall be furnished within six months of the date of the death of the person entitled to such benefit, as aforesaid, or of the last survivor of any such persons as the case may be.'

This clearly shows that if part of the purpose of a wakf is to provide for the wakif himself or for any member of his family or his descendants, the provisions of the Act will not come into force till after the death of such persons We are therefore of opinion that the order of the learned District Judge was correct and dismiss this application with costs "

Again, in *Mohammad Sabir Ali* v *Tahir Ali*[2], the following observations occur:

"The Wakf Validating Act VI of 1913 does not prescribe any amount or proportion of the income of wakf property that may be reserved by a wakif for the maintenance and support of himself, his family and descendants The entire income of the wakf property may be reserved for this purpose The words 'wholly or partially' in section 3 of the Act have reference to the income of the wakf property and not to the 'maintenance and support' of the wakif and others When the entire income is thus reserved for the wakif, his family and children, it matters little whether the words employed are 'maintenance and support' or 'use' or 'benefit' or the like "

I shall now deal with the four decisions quoted by Sri M. M Ismail in support of the contention that, where there is a concurrent provision for religious and charitable acts along with a provision for the maintenance and support of the family, it will not be a valid wakf under section 3 of Act VI of 1913. The four decisions, chronologically, are these

Saiyed Shabbir Hussain v. *Shaikh Ashiq Hussain*[1]; *Ali Bakhtiyar* v. *Khondkar Altaf Hossain*[3], *Kadir Murthuza* v *Mohammad Murthuza*[4]; and *Tyebhoy* v. *Collector of Ahmedabad*[5].

In *Saiyed Shabbir Hussain* v *Shaikh Ashiq Hussain*[1], the testator, one Mian Mohammad Aitimad Alikhan, who had no legal heirs, made a will, and he appointed one Hussain as executor, trustee or mutawalli to carry out the directions under the will, and also provided for the line of succession of the mutawalli The income of properties was about Rs. 1,710 per annum Only about Rs 500 was to be spent on objects of charity A specified portion was given for the maintenance of the dependents and servants, and the mutawalli was to get Rs. 400 a year as his remuneration. (*Vide* pages 435-436 of the report) One Shabbir Hussain, who was the mutawalli for the time being, filed his accounts in the District Court, Lucknow, under the provisions of the Mussalman Wakf Act XLII of 1923. The accounts were duly checked and audited under that Act Thereafter one Ashiqu Hussain, entitled to a small benefit of Rs 5 per month under the will, filed a petition requiring Shabbir Hussain to furnish particulars under section 3 of the Charitable and Religious Trusts Act (XIV of 1920) The mutawalli resisted that application contending that the Charitable and Religious Trusts Act was applicable only to a trust purely for public purposes, but the deed in that case was a mixed wakf created partly for public purposes and partly for private purposes and that consequently it would not fall under the Charitable and Religious Trusts Act, but would fall only under Act XLII of 1923. The matter was referred to a Full Bench, and the Full Bench

1. I L R 4 Luck 429: A I R 1929 Oudh 225 117 I C 739
2 (1954) I L R 2 All 556 at 572 A I R 1957 All 94
3 I L R 60 Cal 790 A I R 1933 Cal 581.
4 (1942) 2 M L J. 672 A I R 1943 Mad 234
5 A I R 1944 Bom 91

accepted the contention of the mutawalli on a comparison of the relevant provisions of the Charitable and Religious Trusts Act, and the Mussalman Wakf Act XLII of 1923 It was in that connection that they observed at page 446 ·

"The conclusion which we draw therefore is that the Act of 1923 deals with a trust by a person professing the Mussalman faith whatever its purpose public or private or partly public and partly private On the other hand, the Act of 1920 covers such trusts only as are created or exist for a public purpose only"

It will be seen that no contention was advanced by the mutawalli in that case that the wakf would not fall even under Act XLII of 1923 on the ground tht it was a wakt under section 3 of the Mussalman Wakf Validating Act VI of 1913. It was evidently not possible for the mutawalli to put forward such a contention, because the private beneficiaries were only dependants and servants of the testator and they would not answer the description of 'family, children or descendants' occurring in section 3 (*a*) of the Mussalman Wakf Validating Act VI of 1913

Thus the Full Bench in *Saiyed Shabbir Hussain* v *Shaikh Ashiq Hussain*[1], was not called upon to decide the question whether a wakf providing partly for the maintenance and support of the family, children or descendants of the wakif, and simultaneously for religious and charitable objects, would not fall under section 3 (*a*) of Act VI of 1913. The observation at page 446 that Act XLII of 1923 applies to a wakf created partly for public and partly for private purposes must be understood with reference to the question before the Full Bench, namely, whether such a wakf would attract the Charitable and Religious Trusts Act, 1920.

The position therefore seems to be this. A wakf making provision simultaneously for the family, children or descendants of the wakif, and for religious and charitable acts, will be a valid wakf under section 3 (*a*) of the Mussalman Wakf Validating Act VI of 1913 *Vide* the decision in *Syed Ahmed* v. *Julaina Bivi*[2], and the observations of Sulaiman, C J in *Mt Buqia Begum* v *Suraj Mal*[3]. Such a wakf will be saved from the operation of the Act XLII of 1923. *Vide Mahboob Bandi* v. *Mahboob Hussain Khan*[4]. Act XLII of 1923 will, however, apply to other kinds of 'mixed wakfs', that is, wakfs providing partly for public purposes and partly for the benefit of individuals who do not answer the description of 'family, children or descendants' of the settlor To such a 'mixed wakf' the provisions of the Charitable and Religious Trusts Act 1920, will not apply.

In *Ali Bakhtiyar* v *Khondkar Altaf Hossain*[5], an application filed before the District Judge by certain Mussalman inhabitants as interested in a certain wakf against the mutawalli under Act XLII of 1923 was thrown out by the District Judge on the ground that it was saved from the operation of Act XLII of 1923, because the wakf was of the nature described in section 3 of the Wakf Validating Act VI of 1913, it was partly a public and partly a private wakf. Reversing this decision of the District Judge, the Bench held that to such a mixed wakf the provisions of Act XLII of 1923 applied, and they relied on the decision of the Full Bench in *Saiyed Shabbir Hussain* v. *Shaikh Ashiq Hussain*[1]. Mitter, J., at page 793 observed ·

"We are of opinion that section 3 of the Mussalman Wakf Validating Act applies to wakfs, which are in the nature of family settlements pure and simple where the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or a charitable purpose of a permanent character."

I have endeavoured to point out (with great respect to the learned Judges) that this may not be a correct statement in so far as it suggests that a mixed wakf providing for simultaneous gift for the family, children and descendants, and for religious and charitable acts will not be a valid wakf under section 4 of the Mussalman Wakf Validating Act VI of 1913. I have also explained what, in my opinion

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1. I L R 4 Luck 429 : 117 I C 739 · A I R 1929 Oudh 225
2. (1946) 2 M L J 335 I L R 1947 Mad 480.
3. A I R 1936 All 404
4. A I R. 1937 Oudh 454.
5. I L R 60 Cal 790

is the true scope of the two Acts in question namely, Act VIof 1913 and Act XLII of 1923. I have also explained that the Full Bench does not consider any question under Act VI of 1913

Kadir Murthuza v *Mohammed Murthuza*[1], is a decision of King, J, of this Court, where the income from the wakf properties went partly to charitable purposes and partly for the maintenance of the family of the creator of the wakf. The application under Act XLII of 1923 was thrown out by the learned District Judge on the ground that the wakf was saved from the provisions of Act XLII of 1923 inasmuch as the wakf fell under section 3 of Act VI of 1913 King, J, reversed the decision of the learned District Judge He observed

"It seems to me that this view is mistaken, that section 3 (*a*) of Act VI of 1913 cannot apply to wakfs which subserve two purposes partly charitable and partly private, but must apply to wakfs originally designed to serve one purpose only and that is private For the maintenance and support wholly or partially of his family, children or descendants' describes two possible sizes of wakfs, the first one being sufficiently large to maintain the family completely and the second one being insufficiently large for this purpose That this must be the meaning of the phrase seems to me clear from the use of the word 'ultimate' in the proviso The proviso is

'Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious a charitable purpose of a permanent character'

The existence of this proviso in the section shows, I think beyond all possibility of dispute that the wakfs which the section validates are those which are primarily and wholly for the purpose of supporting and maintaining the family, children or descendants of the creator of the wakf All that the Act requires is that in case the family should one day become extinct there should be a provision in the wakf for the benefit of some religious pious or charitable purpose I am of opinion therefore that the learned District Judge was wrong in holding that this wakf was excluded from the Act"

With great respect to the learned Judge, I am unable to accept his interpretation of the words "wholly or partially" in section 3 (*a*) of Act VI of 1913 as qualifying the words 'maintenance and support'; On the other hand, it seems to me that the words 'wholly or partially' have application only to the income of the properties settled under the wakf. In other words, 'wholly' will refer to a type of wakf where the entire income for the time being is devoted to the maintenance and support of the family, children or descendants of the settlor, and the word 'partially' will apply to a kind of wakf where only a part of the income for the time being is so devoted the other part being devoted simultaneously for religious or charitable purposes.

I have discussed the point already and I need not repeat the reason The decision of King, J., cannot stand in view of the decision of the Bench in *Syed Ahmad* v. *Julaina Bivi*[2] I respectfully follow the Bench decision, and also the decision in *Mahboob Bandi* v. *Mahboob Husain Khan*[3], and the observations in *Mohammad Sabir Ali* v. *Tahir Ali*[4], already quoted, namely, that the words 'wholly or partially' in section 3 of the Act have reference to the income of the wakf property and not to the 'maintenance and support' of the wakif and others.

In *Tyebhoy* v. *Collector of Ahmedabad*[5], the deed of dedication directed that the trustees should apply not less than half the net income towards the establishment, continuance and maintenance at Surat of a charitable dispensary and hospitals, and divide the balance of the net income into eight equal shares between the settlor's sons and daughters during their respective lives and after their death among their legitimate lineal descendants, provided that in case of failure of decendants of the settlor the whole of the balance of that net income was to be applied for the purposes and benefit of the dispensary and hospitals The learned District Judge acting under the provisions of the Mussalman Wakf Act XLII of 1923, called upon the trustees to pay contribution in respect of half of the income of the trust properties on the ground that at least half the income of the trust was independent of any family obligation and was therefore not saved from the operation for Act XLII of 1923.

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1. (1942) 2 M L J. 672 A I R 1943 Mad 234.
2. (1946) 2 M.L J. 335 I L R 1947 Mad 480.
3. A I R 1937 Oudh 454
4. (1954) I L R 2 All. 556 at 572.
5. A I R 1944 Bom. 91

by virtue of the exception in the definition of ' wakf ' in Act XLII of 1923 exempting a wakf of the nature described in section 3 of the Mussalman Wakf Validating Act VI of 1913 This decision was upheld by Lokur, J. The decision may be justifiable on the peculiar facts of the case, and if the observations of the learned Judge may be understood as being confined to the particular order of the learned District Judge, I have no comment But Lokur, J , also quotes the observations of Mitter, J., in *Ali Bakhtiyar* v *Khondkar Altaf Hossain*[1], that section 3 of the Mussalman Wakf Validating Act VI of 1913, would apply only to a family settlement, pure and simple where the entire income is intended for the family, and that, where it is a mixed wakf with a concurrent gift for a public purpose, the provisions of Act XLII of 1923 would apply Lokur, J , also observed that that was also the view taken by the Full Bench in *Saiyed Shabbir Hussain* v *Shaikh Ashiq Hussain*[2] With great respect, for the reasons already pointed out, I would express my dissent from these observations.

Thus, the first line of argument of Sri Ismail for saying that Exhibit A-22 will not be a valid *wakf-alal-aulad* under section 3 (*a*) of the Mussalman Wakf Validating Act VI of 1913, must fail

The second line of argument is that, while the plaintiff and the plaintiff's sister may answer the description of the wakif's family within the meaning of section 3 (*a*) of the Mussalman Wakf Validating Act VI of 1913, the same cannot be said of the plaintiff's descendants or the plaintiff's sister's descendants. The submission is that the collocation of the words ' his family, children or descendants' shows that the word ' descendants ' will take in only the descendants of the settlor, and that the descendants of the existing members of the family of the settlor was meant to be excluded by the Act. In support of this contention, the learned Counsel relies on the observations of Malik, J., in *Rahmanul Hasan* v. *Zahurul Hasan*[3]. The learned Judge says :

> "The question is whether Mt Masiban and her descendants could be included in the term 'family' The word 'family' has not been defined in the Act It is surprising that the Legislature should have used a term, which though in a sense has a well defined meaning, is a term of great flexibility and is capable of many different meanings according to the connection in which it is used. The meaning of the word came to be considered in two cases by this Court (*See Mt. Musharaf* v *Mt Sikandar Johan*[4], and *Ghazanfar Hussain* v. *Mt Ahmadi Bibi*[5].) It is no doubt true that the word 'family' has been interpreted in a very wide sense, but it could not be said that it would include any and every relation by blood or marriage howsoever remote and all their descendants should be included in that term Though the rule against perpetuities may be inapplicable in the case of the lineal descendants of the wakif, I do not think the section was intended to give the same exemption to the descendants or members of his family, generation after generation, and yet unborn "

But the above observations more or less stand alone and the weight of authority is in favour of the view that the term ' family ' indicates person descended from one common progenitor having a common lineage. Thus, in this case the plaintiff is the settlor's elder brother's son, and therefore the plaintiff and the settlor can trace their descent from one common progenitor. Similarly the plaintiff's descendants and the settlor can trace their descent from one common progenitor So too, the plaintiff's sister and her descendants and the settlor can trace their descent through one common progenitor Of the cases which have decided this, it is enough to cite *Ghazanfar Husain* v. *Ahmadi Bibi*[6], *Ismail Haji* v *Umar Abdulla*[7], *Asha Bibi* v *Nabissa Sahib*[8], and *Abdul Qavi* v *Asaf Ali*[9]

In *Ghazanfar Husain* v. *Ahmadi Bibi*[6], the question was whether the provision for the maintenance of the three nephews of the settlor and all their descendants, generation after generation, would be a valid wakf under section 3 (*a*) of the Mussalman Wakf Validating Act VI of 1913. Answering the question in the affirmative, the learned Judges observed at page 379

1. I L.R 60 Cal 790
2. I L R 4 Luck 429 : 117 I C 739 A I R 1929 Oudh 225.
3. A I R 1947 All 281 at 284
4. A I R 1928 All 516
5. 1930 A L J 109
6. I L R 52 All 368 at 379-380 ,
7. I L R 1942 Bom 441 at 445-446
8. A I R 1957 Mad 583 at 587.
9. A I R 1962 All 364

"We are of opinion that the word 'family' was intended to be used in this section in a very large and extensive sense. The policy of the Act was to validate the creation of a wakf in perpetuity in favour of persons who happened to be the members of the family according to the popular acceptance of that term. Technically the word 'family' may be taken to mean the collective body of persons who live in one house and under one head or manager, and includes within its fold a household consisting of parents, children and servants and, as the case may be, lodgers or boarders. Popularly however, the term indicates persons descended from one common progenitor and having a common lineage. The nephews of the settlor are in this sense the members of his family. It could never have been the object of the Legislature to exclude persons who were related by blood merely by reason of the fact that they did not reside in the house of the settlor or that the settlor was not normally responsible for their maintenance. There is nothing in section 3 (*a*) to indicate that any such limitations were in the contemplation of the Legislature. If these limitations are introduced, the result would be to considerably narrow down the scope and utility of the Act.

The word 'descendants' in section 3, clause (*a*) has some bearing upon the question under consideration. It clearly indicates persons descended from the settlor both in the male and the female line. A descendant is an individual, irrespective of the sex, proceeding from an ancestor in any degree. The daughter's sons and daughters' daughters' do not reside in the same house as the settlor and have no claims upon his bounty. It is clear that descendants in the female line not residing in the house of the settlor and not maintained by him are within the Act and cannot be excluded from its purview."

In *Ismail Haji* v. *Umar Abdulla*[1], Chagla, J. (as he then was) followed the above decision and held that Hoosein Noor Mahomed, the sister's son of the testator would answer the description of the family of the testator under section 3 (*a*) of Act VI of 1913. On the death of Hoosein Noor Mahomed, his heir was his paternal uncle's son Umar Abdulla. Chagla, J., pointed out that Umar Abdulla and the testator could not trace their descent from a common progenitor, nor were there any ties of kinship between them; hence Umar Abdulla could not answer the description of the family of the settlor. The learned Judge proceeded to observe that because the disposition in favour of the heirs of Hoosein Noor Mahomed was void, the provision for the ultimate benefit of the charity also fail.

So far as the present case is concerned, it will be noted that the words used in respect of the persons to succeed the plaintiff are his 'சந்ததிகள்' which means the descendants and this is also the term used in respect of the persons who have to succeed the plaintiff's sister. The word (*Santhathigal*) can properly be translated as descendants and not heirs, and so the ground on which Umar Abdulla was held not to be a member of the settlor's family by Chagla, J., will not affect the descendants of plaintiff or the descendants of the plaintiff's sister in this case.

Asha Bibi v. *Nabissa Sahib*[2], was a Bench decision where, after directing that the trustees shall be appointed from qualified Muslims of Tanjore, including applicants from the founder's family, the learned Judges proceeded to indicate what they meant by the term 'family'. They observed at page 587:

"The term 'family' will be construed in the sense of 'family' used in section 3 (*a*) of the Mussalman Wakf Validating Act, 1913, which was intended to be used in a very large and extensive sense. The policy of that Act was to validate the creation of a wakf in perpetuity in favour of persons who happened to be the members of a family according to the popular acceptance of that term.

Technically the word 'family' may be taken to mean the collective body of persons who live in one house and under one head or manager, and includes within its fold a household consisting of parents, children, and servants and, as the case may be, lodgers or boarders. Under the Mussalman Wakf Validating Act, it is intended to be used in a broad and popular sense.

Popularly, however, the term indicates persons descended from one common progenitor and having a common lineage. It will take in both agnates and cognates and relations by blood or marriage. The nephews of the settlor are in this sense the members of his family. Similarly daughters-in-law, the son of a half-brother or the son of a half-sister."

They quoted a number of cases, including *Ghazanfar Hussain* v. *Ahmadi Bibi*[3], and *Ismail Haji* v. *Umar Abdulla*[1]. There is thus the authority of a Bench of this Court in support of the view expressed in *Ghazanfar Hussain* v. *Ahmadi Bibi*[3], followed in *Ismail Haji* v. *Umar Abdulla*[1], that the term 'family' will indicate persons descended from one common progenitor and having a common lineage.

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1. I.L.R. 1942 Bom. 441.
2. A.I.R. 1957 Mad. 583.
3. I.L.R. 52 All. 368.

In *Abdul Qavi* v *Asaf Ali*[1], there is an exhaustive discussion of the case-law. In that particular case, however, the question was limited, namely, whether one Fatima, the step-daughter of the sister of wakif No 1, who had been brought up from her childhood by wakif No 1 as her child, was a member of the family. It was held that she was a member of the family of wakif No. 1. It was also held that her descendants as such would not *ipso facto* become members of the settlor's family The learned Judges, however, dissented from the view of Chagla, J, that the failure of the disposition in favour of such descendants would invalidate the ultimate benefit for the charities The learned Judges took the view that on the failure of the intermediate disposition in favour of Fatima's descendants, the ultimate benefit of the charity would be accelerated.

In view of these decisions I have no hesitation in holding that the plaintiff and his descendants as also the plaintiff's sister and her descendants will belong to the settlor's family within the meaning of section 3 (*a*) of the Act VI of 1913, and therefore Exhibit A-22 cannot be said to be an invalid *wakf-alal-aulad,* under Act VI of 1913, on the ground that they do not belong to the members of the settlor's family.

I have thus shown that Exhibit A-22 is a *wakf-alal-aulad* under section 3 (*a*) of the Mussalman Wakf Validating Act VI of 1913. That is sufficient for the disposal of the appeal It may however be necessary to consider the question if it arises whether the term *wakf-alal-aulad* used in section 3 (1) (*iii*) of Act XXIX of 1954 must be confined to a wakf validated under section 3 of Act VI of 1913, or will take in some other kinds of *wakf-alal-aulad* Act XXIX of 1954 does not say that *wakf-alal-aulad* means only a wakf validated under section 3 of Act VI of 1913. In this connection it is worthwhile noting that Ameer Ali in his learned treatise on Mohammedan Law, Fourth Edition (1912), volume 1, at page 276, says that a valid wakf may be made in favour of—

(*a*) a Mussalman or a Zimmi, but not in favour of an alien or Harbi (an inhabitant of the Dar-ul-Harb),

(*b*) One's children and descendants, male and female, born or unborn,

(*c*) similarly, other people's children and descendants,

(*d*) heirs as well as non-heirs,

(*e*) One's kindred, neighbours, etc.

(*f*) Strangers,

(*g*) One's dependants, servants, etc., and

(*h*) under the Hanafi Law in favour of the wakif himself first, and then for other objects, in other words, a wakif may constitute himself the first beneficiary of the trust.

Similarly it will be seen that the wakf in *Saiyed Shabbir Hussain* v. *Shaikh Ashiq Hussain*[2], was partly a wakf in favour of the wakif's dependants and servants, and in the order of reference it was stated,

"Under the Mohamedan Law a wakf may be constituted in favour of one's children and also kindred, neighbours, dependants, servants, etc"

The test propounded by Sri Ismail of primary intention for deciding whether a wakf will fall under the main definition in section 3 (1) or section 3 (1) (*iii*) of Act XXIX of 1954 does not enable us to determine who could be the beneficiaries under a *wakf-alal-aulad* The criterion of primary intention may perhaps be useful in some cases, but it may fail in some cases, where, for instnce, the provision for the family is half and the provision for religious and charitable purposes is half. For the purpose

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1. A.I.R. 1962 All. 364.

2. I L.R. 4 Luck. 429.

of the application of the Act, it may not always be necessary to resort to this criterion of primary intent, and it seems to me that it may not make much difference from the practical point of view which criterion is applied, because under section 15 (2) (*d*) of the Act the Board is empowered to settle schemes of management for a wakf, and subject to the result of a suit under sub-section (3) and from the practical point of view, the Board may perhaps legitimately claim jurisdiction to settle a scheme even in the case of what would readily be considered a *wakf-alal-aulad* under section 3 (1) (iii) of Act XXIX of 1954 That jurisdiction is conferred on the Board as the *wakf-alal-aulad* would be a wakf for the purpose of the Act to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, and for the proper administration and discharge of the responsibility the Wakf Board has been given such a power.

The decision in *Ibrahim Sahib's Trust* v *State Wakf Board*[1], does not in my opinion contain anything to invalidate my view that the deed in this case, Exhibit A-22 will be a *wakf-alal-aulad* under section 3 (1) (iii) of Act XXIX of 1954

Since the deed is a *wakf-alal-aulad* and it would be a wakf only to the extent to which the property is dedicated for the religious and charitable acts mentioned in the deed, it will be necessary for the Court to determine that extent in the present litigation itself. I am unable to agree with the submission of Sri M M Ismail that such a determination is foreign to the scope of the suit The plaintiff came forward with a case that Exhibit A-22 was not a valid wakf at all On the other hand, the Board contended that it was a wakf in its entirety and no portion of the income could be claimed by the plaintiff or his descendants or the plaintiff's sister and her descendants. Under those circumstances, it is the duty of the Court to declare the true position and to ascertain the extent to which the property may be held to have been dedicated for the religious and charitable purposes mentioned in the deed Sections 15 (3) and 27 (2) of the Act are further indications that the Court should make a declaration and ascertain it, in this suit itself After all, the whole matter has come up before the Court, and there is no reason why the question should not be decided now. Indeed, if the question is not decided, the plaintiff may be faced with a plea of *res judicata* in any future suit which he may bring.

Overruling the contention of the Wakf Board, I declare that Exhibit A-22 is a *wakf-alal-aulad* under section 3 (1) (iii) of Act XXIX of 1954, and the suit is remanded to the trial Court (District Munsif of Vellore) for determination of the extent to which the property has been dedicated for the religious and charitable purposes mentioned in the deed The appeal is allowed partly to this extent The parties will bear their own costs in the appeal. Leave to appeal granted to both sides Board Counsel's fee Rs. 500 (for senior) plus junior's fee 150.

V.K ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE M. NATESAN.

P. Parthasarathy Chetty .. *Appellant**

v.

S. Chitra Pillai and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 35 and 97 to 103—First suit under Order 21, rule 103 against order for removal of obstruction dismissed—Second suit between same parties claiming same relief but purporting to be under different title—Latter suit filed beyond one year from order for removal of obstruction—Maintainability

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 26 and 35—Eviction order under earlier Rent Control Act of 1949 without impleading the sub-tenant—If can be executed against sub-tenant after the coming into force of the 1960 Act

A landlord applied for execution of a decree for eviction obtained under the Madras Buildings (Lease and Rent Control) Act, 1949 against his tenant The sub-tenant who was not impleaded in the eviction proceedings obstructed delivery but on an application by the landlord, the obstruction was

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1. (1965) 1 M L J 214.

*S A No 29 of 1965. 18th March, 1966.

ordered to be removed by the Court on 16th July, 1956 Thereupon the obstructor instituted a suit alleging, among other grounds, that he was a direct tenant of the landlord and that the order of eviction was not binding on him The suit was dismissed by the trial Court on 30th January, 1957, the Court holding that the obstructor was only a sub-etnant This dismissal was confirmed in Second Appeal on 9th April, 1964 But in the meanwhile the Madras Rent Control Act, 1949 was repealed and the 1960 Act had come into force

After the disposal of the Second Appeal on 9th April, 1964 as aforesaid the obstructor-sub-tenant filed a second suit against the landlord pleading that by reason of the finding of the sub-tenancy in the Second Appeal read with sections 26 and 35 of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) the original order of eviction had become unexecutable against him and claimed injunction restraining proceedings for his eviction in pursuance thereof On the question of the maintainability of the second suit ;

Held, the suit brought beyond one year from the date of the order for removal of obstruction, *viz* 16th July, 1956, was clearly barred by limitation, besides being barred by *res judicata*

In a suit instituted under Order 21, rule 103 of the Civil Procedure Code by a person in possession who is sought to be dispossessed the questions that are tried are questions of title to the present possession The claim to the same relief cannot be tried once over again between the same parties, just because in the latter suit the title on which relief is claimed purports to be different from the one the plaintiff had put forward earlier

The argument that the sub-tenant having not been impleaded in the proceeding for eviction, the order of eviction would not be binding on him after the coming into force of the 1960 Act by virtue of the provisions contained in sections 26 and 35 thereof, is unsustainable It is settled law that a decree in ejectment passed against a tenant at the instance of a landlord is not only binding upon the tenant, but also upon his sub-tenants provided they have no right independent of the right of their tenant in the demised premises Section 26 of the Madras Act XVIII of 1960 which says that an order of eviction would be binding on the sub-tenant if made a party is only an enabling provision and cannot be construed to affect the well established principle that a sub-tenant is bound by the order for possession against the tenant Section 26 by statutorily providing for the impleading of sub-tenants even before the passing of the eviction order only obviates the possibility of further prolonged proceedings and a long drawn out suit under Order 21, rules 97 to 103 of the Code of Civil Procedure

Appeal against the decree of the City Civil Court (Additional Judge), Madras in Appeal Suit No 233 of 1964, preferred against the decree of the Court of the City Civil Court (V Assistant Judge), Madras in Original Suit No 1220 of 1964.

M C Raghavachari and *N S Varadachari*, for Appellant

A Sundaram Ayyar, S Padmanabhan and *D K Sridevi*, for Respondent

The Court delivered the following

JUDGMENT —This Second Appeal by the first defendant is having its third round in this Court and that too on the intangible claim of a sub-tenant to maintain his possession of a premises in respect of which the owner has obtained an order for eviction against his tenant The facts and proceedings in which the subtleties of of law and procedure have had their full play may be briefly set out The appellant is the owner of a premises in the City The second respondent herein was his tenant, and he initiated against him proceedings for eviction H R C No 3036 of 1955, under the Madras Buildings (Lease and Rent Control) Act, 1949 On 17th January, 1956, the owner secured the order for eviction and applied, under section 9 of the Madras Buildings (Lease and Rent Control) Act, 1949, to the City Civil Court, Madras, in execution, E P No 592 of 1956, for the issue of a warrant for delivery of possession The present first respondent obstructed delivery and this led to E A No 382 of 1956 by the owner for removal of obstruction On 16th July, 1956, an order was passed directing the removal of the obstruction, the Court granting time to the present 1st respondent, who will be hereafter referred to as the obstructor or sub-tenant according to the context to vacate the premises by 31st July, 1956 Thereupon, the obstructor instituted the suit O S No 1236 of 1956 alleging that he was a direct tenant of the owner, that the tenancy was only of the site and not of the building, that he was entitled to the protection and privileges conferred by the City Tenants Protection Act, that the order for eviction had been obtained collusively and that in the circumstances, the order for eviction was not binding on him Appropriate declaration and injunction were prayed for. On 30th January, 1957, this suit was dismissed, the trial Court finding that the obstructor was only a sub-tenant under the tenant and that the order of eviction was not a collusive order. The Court further found that the City Tenants Protection Act

had no application to the premises in question, the lease being of land and superstructure. There was an appeal therefrom by the sub-tenant, A S. No 70 of 1957 City Civil Court, Madras, and the appellate Court differed from the Court of first instance and held that the obstructor was not a sub-tenant and that the proceedings for eviction had been instituted collusively In the result, it has found that the eviction order was not binding on the obstructor. The matter was then brought up to this Court by the owner in Second Appeal, and this Court set aside the judgment of the lower appellate Court and remanded the matter for fresh disposal On remand, the lower appellate Court agreed with the findings of the trial Court and confirmed the decree of dismissal of the suit. Against that decree, the sub-tenant came up in Second Appeal to this Court, S A No 1323 of 1961 This Court, in Second Appeal, upheld the findings of the trial Court that the obstructor was not a direct tenant of the owner and that the lease was not of vacant land but of land with superstructure thereon Observing that the question depended entirely on appreciation of evidence and that the findings of both the Courts below were findings of fact, this Court refused to interfere in Second Appeal An attempt was made in Second Appeal to contend that by the repeal of the Madras Buildings (Lease and Rent Control) Act of 1949 and by reason of the provisions under the new Act, the Madras Buildings (Lease and Rent Control) Act, 1960, a new situation had arisen, and that the owner could not in the circumstances avail himself of the eviction order obtained under the old Act It was contended that for the sub-tenant to be bound by an order for eviction under the Madras Buildings (Lease and Rent Control) Act, he must, under the new Act, be made a party to the proceedings The obstructor was, however, not permitted to raise this new ground It was pointed out that the plea that was taken by the obstructor, that he was a sub-tenant entitled to certain benefits under the 1960 Act, was in direct contravention of the stand taken by him in the execution proceedings and in the suit which had been taken up to Second Appeal The Second Appeal was dismissed with costs on the 9th of April, 1964 On the 14th of April, 1964, the suit, out of which the present Second Appeal arises, was instituted by the obstructor as plaintiff, impleading therein the owner as the 1st defendant and the erstwhile immediate tenant as the 2nd defendant The plaint sets out the original order of eviction, the subsequent proceedings and the dismissal of the Second Appeal It refers to the fact that the owner was applying for the removal of obstruction and delivery of the order he had secured The plaint purports to rely on the dismissal of the Second Appeal on 9th April, 1964, as giving a fresh cause of action It is submitted in the plaint that by reason of the finding of sub-tenancy in the Second Appeal, read with sections 26 and 35 of the Madras Buildings (Lease and Rent Control) Act, 1960, the original order passed in H R C No 3036 of 1955 became unexecutable against the obstructor, that is, the sub-tenant. There is no specific prayer for a declaration that the order passed by the executing Court directing the removal of obstruction is bad However, a declaration is prayed for that the order dated 17th January, 1956, in H R.C. No 3036 of 1955 was inexecutable against the sub-tenant, the plaintiff in the suit, in view of the findings in Second Appeal No 1325 of 1961. Injunction was claimed restraining proceedings for eviction

The learned City Civil Judge, the Court of first instance, rejected the pleas put forward observing that the non-impleading of a sub-tenant would not exculpate him from the effect of the valid eviction order against the principal tenant or confer immunity in a petition for removal of obstruction filed under the Code of Civil Procedure. It was further observed that the petition for removal of obstruction, E A. No 382 of 1956, had been allowed on 31st July, 1956, and the suit O S No 1236 of 1956, which included a prayer for a declaration against that order, had been dismissed finally and the dismissal was confirmed in Second Appeal. The present suit which did not even contain a prayer relating to the order for removal of obstruction and filed beyond one year from the date of the order, cannot efface or ignore the effect of the conclusiveness of the order for removal of obstruction under Order 21, rule 103, Civil Procedure Code. In the result, the suit was dismissed. But the obstructor sub-tenant, has succeeded in the appeal therefrom and it is this that

has led to the present Second Appeal The learned Additional Judge, City Civil Court, Madras, noticing that the obstructor is a sub-tenant under the 2nd defendant against whom an order for eviction had been passed, overruled the plea of limitation on the ground that it is without substance. The following observations of the judgment show the approach .

> " The suit is to establish the plaintiff's title as a sub-tenant It is in that view that he has prayed for the declaration that the eviction order obtained by the 1st defendant against the 2nd defendant is not binding on him It cannot however be denied that the effect of granting that declaration would amount to upholding the objection which the plaintiff put forward in execution taken out by the 1st defendant against the 2nd But that cannot be helped, for, the scope of the present suit is entirely different from the scope of the suit which the plaintiff filed to set aside the summary order The suit to set aside the summary order was based on the title of the plaintiff to present possession as a direct tenant under the 1st defendant But the basis of the present suit is that the plaintiff is entitled to present possession as a sub-tenant Both these being different, I do not think that there is any substance in the plea of limitation "

I am unable to follow this reasoning. No doubt, the plaintiff in a suit under Order 21, rule 103 institutes the suit to establish the right which he claims to the present possession of the property. The claim to evict the obstructor, which was put forward by the owner, was on the ground that he was only a sub-tenant. This the sub-tenant resisted claiming certain superior rights in the property When it was found in the summary proceedings that he was only a sub-tenant and eviction ordered, he filed a suit to have the summary order set aside. The basis of the order being the sub-tenancy of the obstructor, I fail to see how the effect of the order can be got over by contending that previously the obstructor did not admit his sub-tenancy, but had been persisting in his claim to independent rights and that now only he is coming forward admitting his sub-tenancy If the sub-tenancy is admitted the validity of the order is beyond question. When in Second Appeal, the order of the trial Court holding that the obstructor was a sub-tenant was confirmed, the Court was not making out for the first time a relationship which did not previously exist The effect of the findings in the previous proceedings is, that the obstructor had been a sub-tenant from the beginning of his tenancy. The judgment in the Second Appeal, confirming the findings of the Courts below affirming the view taken in the summary proceedings, cannot give rise to a fresh cause of action for resuscitation of the proceedings; it does not confer any fresh title to the obstructor for him to start on a third round of litigation on it. The question in the prior proceedings which got a finality by the dismissal of the Second Appeal, was whether the obstructor was a sub-tenant. The owner's right to evict the obstructor was based on the sub-tenancy only and if the finality of that order is not otherwise affected, say by reason of the repeal of the old Rent Control Act and the fresh enactment in 1960, the order has to stand If the order directing the removal of any obstruction by the sub-tenant is not otherwise a nullity, it cannot be ignored, its effect could be got round only in the way pointed out by law and the obstructor has tried the remedy and failed. The learned Additional Judge himself notices that any declaration granted to the plaintiff in the present suit would amount to upholding the obstruction which the plaintiff had put forward in the execution proceedings but feels helpless in the face of the averments in the new plaint But does it answer the existence of an order of the Civil Court overruling the claim of the obstructor to possession by a judicial order which had obtained a finality ? By simply by-passing the order the sub-tenant cannot get over the order. The order if not superseded otherwise has to be set aside by a suit filed within one year. Assuming that the basis of the present claim is different, as the object even now is to maintain only the present possession, the very effort in the prior suit, both the letter and the spirit of the Code of Civil Procedure and the Limitation Act would require that this suit must be looked upon as a second suit to get over the same order for removal of obstruction. It is the substance of the plea that counts, not the form in which it is presented, or the language in which it is couched. Rights of parties cannot be concluded that way nor liabilities evaded Unless it is established that the order for removal of obstruction has been superseded by the New Act, as contended for the obstructor, the suit would be clearly barred by limitation, besides *res judicata.*

In a suit instituted under Order 21, rule 103 of the Code of Civil Procedure by a person in possession who is sought to be dispossessed the questions that are tried are questions of title to the present possession The claim to the same relief cannot be tried once over again between the same parties, just because in the latter suit the title on which relief is claimed purports to be different from the one the plaintiff had put forward earlier. The opposite party had resisted the plaintiff's claim on the very title of sub-tenancy now conceded, and succeeded in non-suiting the plaintiff on the very title There is no plea of any subsequent change in the jural relationship, or acquisition of any independent and paramount title since the owner obtained his order of eviction for founding the second suit

The crucial point for consideration is whether by reason of the repeal of the Rent Control Act of 1949 under which the order in question was passed and the enactment of 1960, the plaintiff had acquired new rights which he could set up against any fresh proceedings for his dispossession in execution The appellate Court is of the view that under the New Act, an order for eviction will not be binding on a sub-tenant unless he had been made a party even in the proceedings before the Rent Controller between the landlord and the chief tenant In that view, relying on section 35 of the New Act, the learned Additional Judge would hold that the sub-tenant not having been impleaded as a party to the eviction proceedings as required under section 26 of the New Act he is not bound by the order. Thus holding against the owner the suit has been decreed and an unqualified declaration and injunction granted to the plaintiff.

Here again, I find there is a misunderstanding of the relevant provisions in the Rent Control Act relating to a sub-tenant It must first be noticed that the sub-tenant as such has not been given any protection under the Act. We are not concerned here with the relationship between the tenant and the sub-tenant. The embargo against eviction is only in favour of tenants. Section 10 of the New Act, which corresponds to section 7 of the Old Act, starts with the prohibition 'a tenant shall not be evicted whether in execution of a decree or otherwise, except, in accordance with the provisions of this section or sections 14 to 16.' It is clear that no protection is given to a sub-tenant from being evicted. Any rights he can claim to continue in possession must therefore be looked for under the common law. In the 1949 Rent Control Act, section 12 (*c*) specifically provided that any order for the eviction of the tenant passed under the Act shall be binding on all sub-tenants under such tenant, whether they were parties to the proceedings or not, provided that such order was not obtained by fraud or collusion. Under the present Act of 1960, which repeals the 1949 Act, the related provision, section 26, is different and runs thus

> " Any order for the eviction of a tenant passed under this Act shall be binding on all sub-tenants who were made parties in the application for eviction but any person who became a sub-tenant after the date of the application for eviction shall be bound by the order of eviction and be evicted as if he were a party to the proceedings, provided that such order was not obtained by fraud or collusion "

Strong reliance is placed on this provision by learned Counsel for the obstructor. He would have this read with section 35 of the New Act which contains *inter alia* the following saving clauses.

> " Notwithstanding the repeal of the said Act (XXV of 1949) . . all . . orders passed or deemed to have been passed, decisions made or deemed to have been made, proceedings or action taken or deemed to have been taken, and things done or deemed to have been done under any provision of the said Act shall be deemed to have been made, issued, passed, taken or done by the appropriate authority under the corresponding provision of this Act and shall have effect accordingly "

By clause (*b*) it is provided :

> " Any liability or penalty incurred or deemed to have been incurred . . any application made or deemed to have been made . . under any provision of the said Act shall be deemed to have been incurred made or commenced under the corresponding provision of this Act "

The argument is that, under the New Act, the sub-tenant must be made a party to the eviction proceedings. Section 26 states it shall be binding on the sub-tenant if made a party. It is argued that by implication the order would not be binding on the sub-tenant if he is not made a party; and that it followed that as the order

of eviction now in questions must under section 35 be deemed to be one under the New Act and as admittedly the sub-tenant was not a party to the proceedings before the Rent Controller the order ceased to be binding on the sub-tenant, on the New Act coming into force.

This argument in my opinion proceeds on a fallacy Section 26 does not say that if a sub-tenant is not impleaded it shall not be binding on him No doubt under the Old Act, the provision was only that an order passed against a tenant was binding on the sub-tenant, in the absence of any fraud or collusion and there is a substantial variation in the new section The object of the particular provision in the Old Act and the effect of the variation by the New Act can be appreciated only if the general law in regard to the matter and the processual law relating to execution of the order in question is understood Under section 9 of the Old Act, the order for eviction under section 7 or section 8 and orders on appeal or execution therefrom have to be executed in the Civil Courts indicated and they shall be executed as if it were a decree passed by that Court. The corresponding provision under the present Act is section 18 and there is no material change therein from the old provision Under both the Acts, there is a provision taking away appeals from orders passed in execution Obviously this would refer to orders appealable under section 47, Civil Procedure Code It is settled law that a decree in ejectment passed against a tenant at the instance of a landlord is not only binding upon the tenant, but also upon his sub-tenants provided they have no right, independent of the right of the tenant in the demised premises Under Order 21, rule 35, Civil Procedure Code where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, if necessary by removing any person bound by the decree who refused to vacate the property Therefore the landlord who has obtained an order for eviction will be entitled under this provision to have the premises delivered to him, if necessary removing any sub-tenant in possession as he would be bound by the order for eviction If the eviction order had been obtained collusively or by fraud, it is an established principle of jurisprudence that it is void as against every person who is not a party to the decree or order Section 12-C of the Act of 1949 only declared these principles to avoid any contention that these principles of law may not apply to proceedings in execution under the Rent Control Act But a sub-tenant not a party to the proceeding against whom possession is sought under Order 21, rule 35 of the, Code of Civil Procedure may set up independent right to continue in possession of the demised premises He may for instance set up his own title or he may plead a direct tenancy as in the present case, apart from contending that the eviction order had been obtained fraudulently and in collusion. In such circumstances, the provisions of Order 21, rule 97 have to be availed of by the decree-holder and thereunder if the Court is satisfied that the objection was wanton and made without just cause, the obstruction could be directed to be removed and the decree-holder placed in possession dispossessing the sub-tenant If the Court finds that the obstruction was from a person claiming in good faith to be in possession of the property on his own account, the application of the decree-holder would get dismissed In the former case, the obstructor would have to make out his claim to possession in a suit instituted by him and in the latter case, the obstructor's possession could be maintained pending determination of his title These provisions of Order 21, namely, rule 35 and rules 98 to 105 while securing to the decree-holder possession of the property in execution against persons bound by the decree, ensure the continuance in possession of a stranger to the decree who in good faith puts forward a claim to continue in possession on his own account or on account of some person other than the judgment-debtor pending the determination of the title to possession in a suit to be instituted under Order 21, rule 103 of the Code of Civil Procedure. The scope of section 26 of the new Act must be understood in this context The Rent Control Act purports to regulate in a cheap and expeditious way the relationship between landlord and tenant in respect of buildings Statutorily providing for the impleading of sub-tenants even before the passing of the eviction order, the possibility of further prolonged proceedings and a long drawn

out suit under Order 21, rules 97 to 103 are obviated. While as a general proposition a sub-tenant's interest ceases with that of the tenant and he could claim no tangible right to the property, there may be cases as indicated above where it may be possible for him to question the determination of the head lease. It must be noted that where the tenancy is for a specific period agreed upon between the landlord and the tenant, the landlord will not be entitled to apply under section 10 sub-section (3) of the Rent Control Act of 1960 for possession of the building before the expiry of the period. If there is lawful sub-letting in such a case with the written consent of the landlord, it may be that the tenant cannot in collusion with the landlord determine his own tenancy and thereby seek to put an end to the sub-tenancy. It may be that in such circumstances the sub-tenant may be entitled to continue in possession till the determination of the agreed period In *Mellor* v. *Watkins*[1], Mellish, L J., observed :

> " It is a rule of law that if there is a lessee, and he has created an under-lease or any other legal interest, if the lease is forfeited, then the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself, but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him."

Section 26 only facilitates enquiries in such circumstances at the time of passing the order for eviction itself. While it seeks to ensure that the sub-tenants are not evicted straightaway in execution by snap orders of eviction obtained behind their backs when they may in fact have a present right to continue in possession, it saves the landlord from further prolonged litigation at the stage of execution. But this enabling provision in the absence of specific language cannot be construed to affect the well-established principle that a sub-tenant is bound by the order for possession against the tenant. The Act does not say that a sub-tenant is a necessary party to a proceeding for eviction. I am unable to read in the provision more than what is found therein. It will be an intolerable position if the landlord is bound to implead each and every sub-tenant with whom he had no privity of contract and about whom he may know little in a case where he is lawfully entitled to vacant possession as against his tenant There may be scores of them in a particular building the landlord would only be incurring the risk of obstruction proceedings, by not impleading them In *Yusuf* v. *Jyotishchandra Banerji*[2], the learned Judges discussing the position of a sub-tenant *vis-a-vis* the head landlord hold that when the landlord obtains a decree in ejectment on forfeiture or determination of the lease by notice against his tenant, the latter's sub-tenants licensees or servants in actual possession of the premises are "persons bound by the decree" within the meaning of rule 35 of Order 21 of the Code of Civil Procedure In *Jafferji Ibrahim Ji* v. *Miyadin Mangal*[3], on an application under Order 21 rule 97 of the Code of Civil Procedure in execution of a decree in ejectment against a tenant where the obstructor relied upon the old Bombay Rent Act, it is observed .

> " No doubt a plaintiff suing for possession may find it advantageous to join all the persons in possession of the suit premises to avoid difficulties which may otherwise arise when he attempts to execute his decree But there is nothing in the Bombay Rent Act which gives persons a better right to obstruct the execution of the decree than they had apart from the Act. "

The present obstructor is in no better position than the obstructors in that case. It is needless to carry the discussion further as there has been a full consideration of the question, if I may say so with respect, by my learned brother Ramamurthi, J, in *Ramachandra Chetty* v *Mothaliyandan Chettiar*[4] That was also a case under the earlier Rent Control Act, (XXV of 1949) and the question for consideration was whether on the repeal of the Act, the order for eviction could be executed against a sub-tenant who had not been impleaded in the proceedings before the Rent Controller as a party respondent as provided in the 1960 Act. The learned Judge observes at page 267 :

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1. (1874) L R 9 Q B 400 — — 273
2. (1912) I L R 39 Cal 739
3. I.L R 46 Bom. 526 : A.I R. 1922 Bom.
4. (1965) 2 M.L J. 265.

"If before Act XVIII of 1960 an order has become an enforceable and executable order, by reason of the particular provision in section 9 read with section 7-A of the old Act, it cannot cease to be an executable or enforceable order by reason of section 35 of the Act, such an interpretation would result in this absurd consequence, that an order for eviction obtained by the landlord under the old Act of 1949 will become absolutely useless and the landlord will be obliged to commence fresh proceedings. I have no doubt whatsoever that the Legislature never intended that section 35 should have such an effect . ...

. . ..

In my opinion section 26 must receive a limited application read with section 35 (2) (*a*) only where the scheme of the enactment can be carried out. In other words section 26 read with section 35 would apply only in so far as they are applicable to a particular situation. But if it would involve a fresh trial reopening the entire matter section 26 cannot possibly have application to such a situation. Even otherwise I am not inclined to agree with the learned Counsel for the petitioner that if the sub-tenant is not impleaded under section 26, the order for eviction cannot be executed against the sub-tenant. It is settled law that if a decree for eviction is passed against the main tenant, the order of eviction can be straightaway enforced and executed as against the sub-tenant I do not think that by enacting section 26 it was the intention of the Legislature to make deliberate departure from this settled and accepted position in law."

In the present case the matter has gone beyond the stage of the landlord securing for himself an executable order. He has put the order into execution under the earlier Act itself under section 9 of the Act in the civil Court for delivery of possession in execution. The civil Court had become seized of the matter as if it were a decree passed by that Court. Once the matter had gone to the City Civil Court to be dealt with as a decree of that Court, its further course has to be governed by the provisions of the Code, unless there is a modification of the Procedure by the express provisions of the Rent Act There is no such modification and orders passed in proceedings in execution would therefore be binding upon the parties thereto, the finality being governed by the provisions of the Code. As pointed out by the Division Bench of this Court in *Narayanaswami* v. *Renuka Devi*[1], on an application for execution of an order of eviction passed by the Controller being presented to the concerned District Munsif (in the present case the City Civil Court) he has to execute the order as if it were a decree for possession passed by him.

Learned Counsel for the sub-tenant has not placed before me any authority for the position that by the repeal of Madras Act XXV of 1949 the orders passed in execution by the City Civil Court have become nullities. The observations in *Natesa* v. *Dhanapal Bus Service*[2], relied on have no application in the interpretation of the statutory provisions now under consideration. As shown earlier even the order of eviction in H.R.C. No. 3036 of 1965 continues to be a perfectly valid order which binds the sub-tenant and could therefore be executed against him.

In the result, the plaintiff's prayers for a declaration that the order for eviction passed in H.R.C. No. 3036 of 1965 is unexecutable as against him and for a consequential injunction fail. The judgment and decree of the Court of First Instance dismissing the suit has therefore to stand. The Second Appeal is accordingly allowed. The decree and judgment of the trial Court are restored and the judgment and decree in appeal set aside. The Order as to costs made by the trial Court will stand. The appellant will be entitled to his costs in the Second Appeal. The parties will bear their respective costs in the lower appellate Court. The plaintiff will have time till 31st October, 1966 to vacate and surrender vacant possession.

No leave.

V.K *Appeal allowed.*

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1. (1960) 2 M.L.J. 318: I.L.R. (1960) Mad. 512

2. I.L R. (1964) 1 Mad. 288: (1964) 2 M.L.J. 23 : A.I.R. 1964 Mad. 136.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN

A. Karuppiah Pillai .. *Appellant**

v.

N. Narayana Mudaliar and another .. *Respondents.*

Easements Act (V of 1882), section 4—Party wall—Easement right to have it maintained as such—Scope.

In the case of a party wall which belongs exclusively to one of the adjoining owners of two tenements but which is subject to an easement or right in the other to have it maintained as a dividing wall, it is permissible for the former to pull it down altogether temporarily with the idea of renovating it and also with the idea of having in it a door and a window when no right to privacy has been established. In such a case the latter cannot ask for a mandatory injunction for restoration of the original wall.

Appeal against the Decree of the Court of the Additional Subordinate Judge of Madurai in Appeal Suit No. 84 of 1960, preferred against the Decree of the Court of the District Munsif of Madurai Town in Original Suit No. 344 of 1959.

A. V. Narayanaswami Ayyar, for Appellant.

K. S. Champakesa Ayyangar and *K. C. Srinivasan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff whose claim to a mandatory injunction for restoration of wall on the basis of easement rights has been rejected by the Courts below is the appellant before me. In between the plaintiff's house and the house of the defendants there is a strip of land used as a lane and the wall in question was built by the plaintiff between the strip of land and the defendant's property but over the defendant's land. This is pursuant to a registered agreement, Exhibit A-1. This agreement was executed by the plaintiff in favour of the defendants and their father. The plaintiff has come forward with this suit on the allegation that contrary to the agreement and understanding between the parties as brought out under Exhibit A-1 the defendants have demolished the wall. The Courts below have held that the plaintiff cannot rest his claim either as easement or as licence and dismissed the suit. There was also a claim by the plaintiff with regard to the lane that it is his exclusive property. That has also been found against as it went against the tenor and terms of the agreement, Exhibit A-1 on which the plaintiff rested his claim to mandatory injunction and as it may not be open to the plaintiff to rely on Exhibit A-1 for one purpose and discredit it for another.

The first question for consideration is whether the plaintiff can lay any claim to the wall in question and compel the defendants to retain the wall. The agreement Exhibit A-1 recites that in the absence of a compound wall on the defendant's site and there being only a fence, the members of the plaintiff's family experienced difficulty in going over the common lane and that with a view to get over this difficulty at the request of the plaintiff, the defendants had permitted him to put up the wall at his expense. Under the agreement the wall was to be raised on the defendants' land at about 10 feet high on a 2 feet foundation. It was to be a brick and mud wall to be plastered with chunam on both sides. At the top the plaintiff could have glass pieces inserted for protection. The agreement recognises the right of the defendants to put up house, roofing etc., on the wall which the plaintiff erected. It is stated therein that the plaintiff had no objection to any such course. It is further provided in the agreement that the wall was erected only for the convenience of the plaintiff and that the plaintiff had no right in the wall and no further recourse in respect of the wall. The only question is whether under this agreement the plaintiff could compel the defendants to retain the wall as a dividing wall.

Ex facie it is difficult to maintain the claim on the basis of a licence. Considering whether there could be an easement, easements are defined under section 4 of the Easements Act thus :

* S.A. No. 798 of 1962 7th March, 1966

" An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and to continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own .... "

In the *Explanation* it is set out :

" In the first and second clauses of this section, the expression ' land ' includes also things permanently attached to the earth the expression ' beneficial enjoyment ' includes also possible convenience, remote advantage, and even a mere amenity "

A V. Narayanaswami Iyer, learned Counsel for the appellants, contends that he has, by erecting this wall, and making the defendants themselves owners of this wall, provided for himself a possible convenience, which may be even a remote advantage. The agreement specifically states that it is for the plaintiff's convenience and enjoyment that the wall has been erected. No doubt, the wall is erected between the strip of land referred to as the common lane and the defendants' property. Still learned Counsel submits that the common lane is appurtenant to his own house and he would have the protection and benefit of this dividing wall while going over the common lane. It is therefore contended that he has provided for and secured for himself an easement right. In this connection reference is made to the several descriptions of party wall found in *Watson* v. *Gray*[1]. Fry, J , referring to " party-wall " as being used in four different senses sets out the four meanings thus :

" They may mean, first, a wall of which the two adjoining owners are tenants-in-common .... In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners . . Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenaments . Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety "

Learned Counsel for the appellant submits that the present wall could come under the third category of party wall referred to by Fry, J , He contends that it is a dividing wall and he has an easement right to have that wall maintained as a dividing wall between the two tenements Of course, the tenement immediately adjoining the party wall is under the very document shown as common property That, the learned Counsel submits, is not of much consequence as the benefit of the wall enures to the main building which he owns himself, the lane being used by him for passage.

Assuming that the plaintiff can claim an easement right in the wall as a dividing wall, the only difficulty in accepting this right in the present case is that the document is vague in the matter It does not provide for the wall being retained there and the burden of the wall being borne by the defendants as a dividing wall between two tenements In fact it is provided that the plaintiff will have no further recourse against the wall and that the wall is the absolute property of the defendants No doubt the wall can be the absolute property of the defendants and still be a party-wall in the third sense given by Fry, J. But the question is whether the agreement provides for its being a party-wall in that sense. No doubt, when the plaintiff incurred expenses in putting up the wall 10 fe t high and the defendants agreed to it, the parties must have intended that the wall has to be retained at least as long as it lasted. No obligation has been undertaken by the defendants to maintain the wall in repair ; nor has the plaintiff retained in himself or acquired for himself the power to repair the wall as and when necessary.

Even assuming that one can infer in the particular circumstances of this case that this is a dividing wall of the third category referred to by Fry, J., still the question has to be considered whether the plaintiff is at all entitled to the mandatory injunction which he claims. In the very plaint it is stated that the defndants have demolished the above wall and dug the foundation for construction of a wall of their own in the place where the disputed wall stood w th the idea of having in the wall a

1. (1880) L.R. 14 Ch D. 192.

door and windows opening into the lane As pointed out in Katiar's Law or Easements and Licences, 5th edition at page 555

> " There is .. ample authority for the view that it is permissible to a tenant-in-common of a party-wall to decrease it or pull it down altogether temporarily with the object of renovating it provided the demolition is carried out in such a way as not to cause any injury or damage to any of the parties concerned ".

Here even it is stated, the wall has been pulled down to put up a fresh wall in that place. The earlier grievance of the plaintiff was the inconvenience felt by him by there being only a fence separating the defendant's property from the common lane. It is to remove that inconvenience and difficulty experienced by the members of this family he, at his expense, built the wall and left it to the defendants absolutely. Now the defendants for the purpose of their own convenience and for putting up buildings have found it necessary to pull down the wall and admittedly are going to put up another construction in the same place That being so, I do not think a case has been made out for the grant of mandatory injunction as prayed for

A point has been made that the defendants propose to open up a door-way and window in the new wall The plaintiff has not made out any right of privacy. He cannot prevent the defendants having any openings in the wall which they propose to put up. The learned Counsel for the plaintiff points out that though he has not prayed for any declaration of his exclusive right over the lane in question, the Court below has given a finding against him in the matter. It is submitted that this question was not gone into in the trial Court, and any decision on the matter is likely to prejudice him The finding of the lower appellate Court in regard to the ownership of the property referred to as the common lane in Exhibit A-1 has properly to be discharged. It is therefore discharged without reference to the merits of the claims of either party regarding the same. The Second Appeal fails and is dismissed No costs

No leave

V.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR. JUSTICE K. S RAMAMURTHI

Periaswami Pillai and others .. *Appellants**

v.

Sri Arunjadeswaraswami Temple at Tirupanandal represented by its sole and hereditary trustee Sri La Sri Subramania Desika Gnanasambandha Pandarasannathi Avergal Adhinakarthar of Dharmapuram Mutt .. *Respondent.*

Transfer of Property Act (IV of 1882), sections 106 and 107—Lease required to be registered not registered—Section 106 would be attracted

Transfer of Property Act (IV of 1882), section 51—Scope

Where a document of lease which requires to be registered under section 107 of the Transfer of Property Act is not registered, section 106 of that Act would be attracted and statutorily the lease would be deemed to be a lease from month to month terminable on the part of either the lessor or the lessee by 15 days' notice In such a case the fact that the written lease provides that the rent is payable at indefinite intervals or that the terms of the lease are such that it is impossible to regard it as a monthly lease, is wholly irrelevant.

Under section 51 of the Transfer of Property Act it is clear that a lessee would not be entitled to compensation in respect of any improvements effected on the property demised

If a lessee effects improvements not in a mistaken belief of his rights in regard to the land but in assertion of rights which he correctly believes to be his but which ultimately turn to be unfounded in law, he cannot claim compensation (*Vide* 60 M L J 538 · L R 58 I A 91 (P C))

Appeal against the Decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 37 of 1961, preferred against the Decree of the District Munsif of Kumbakonam in Original Suit No. 14 of 1960.

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* S A. No. 1010 of 1962 and Memo. Cross-objections 25th March, 1966.

T. R. Venkataraman, for Appellant.

S. Nagaraja Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—Defendants, are appellants in the Second Appeal. The plaintiff is Sri Arunjadeswaraswami Temple at Tirupanandal. The temple filed the suit to recover possession of the land of an extent of 120 *kulis* belonging to it. The facts which are not in controversy are that on 24th January, 1893 the temple granted a lease of the property to one Doraisami Kothan, the father of the first defendant, subject to the condition that this Doraisami Kothan shall take possession of the property, construct a brick building for Drowpadiamman Temple, start and develop a *nandavanam* all round the temple and plant and rear coconut trees in the *nandavanam*, and pay a rent of 12 annas per fasli to the *devasthanam* on or before 31st January of each fasli. He should also maintain worship in the Amman temple. In default of compliance with the conditions, if the temple wants he should surrender possession of the property with the trees, temple building, *nandavanam*, etc It is the plaintiff's case that Doraisami Kothan got into possession of the property and complied with the conditions as per the lease deed Exhibit A-4. Doraisami Kothan died on 6th December, 1940 Thereafter the first defendant got into possession of the property. He has created certain leases in favour of defendants except defendant 8. The temple through its Advocate issued notice Exhibit A-6 dated 17th June, 1959 calling upon the aforesaid defendants to hand over possession of the property along with the temple building, *nandavanam*, standing trees, etc., alleging that there has been default on the part of the first defendant to perform the conditions under Exhibit A-4. The complaint of the temple was that the first defendant was guilty of gross negligence and dereliction of duties, and that he did not attend to the temple, etc. The first defendant's Advocate sent a reply, Exhibit A-7, dated 14th July, 1959 in which the first defendant set up title to the property and did not recognise or accept the title of the temple. This repudiation and attitude of the defendant led to the present suit, O S. No 14 of 1960 on the file of the District Munsif's Court, Kumbakonam.

The trial Court found that the property belonged to the temple and there is no substance in the defendants' contention that the property was the private property of Doraisami Kothan or, the first defendant. It also held that as the lease deed in question was not registered as required by section 107 of the Transfer of Property Act, it was terminable on the part of either lessor or lessee by 15 days' notice, and would be deemed to be a lease from month to month as specified in section 106 of the Transfer of Property Act. In this view the contentions of the defendant were negatived and a decree for possession was passed in favour of the plaintiff. On appeal, the appellate Court while confirming the judgment of the trial Court on the merits with regard to the plaintiff's claim for possession held that the first defendant would be entitled to compensation with regard to the coconut trees which he claimed to have planted on the land in question. It had directed the question of compensation to be determined by a commissioner. The first defendant had preferred the Second Appeal. The plaintiff has filed a memorandum of cross-objections with regard to the claim of compensation which was upheld in favour of the first defendant.

Mr. Venkataraman, learned Counsel for the appellants, contended that the lease in question terminated with the death of Dorasami Kothan in 1940, that thereafter it would not enure in favour of the first defendant with the result that his possession thereafter should be presumed to be adverse as that of a trespasser, and that as the first defendant had been in such possession without title as trespasser for over 12 years from 1940 he has perfected his title by adverse possession and the plaintiff's suit is liable to be dismissed on that ground. In support of his contention, learned Counsel relied on the decisions in *Saldana* v. *R C. Church, Mermajal*[1], and

1. A.I R. 1930 Mad 434.

Jumma v. *Madhusoodan Dayal*[1]. Learned Counsel also relied upon the decisions in *Muralidhar* v. *Smt Tara Dye*[2], and *Ramachandra Agarwala* v. *Syameswari Dasya*[3], in support of his further contention that as the lease deed was unregistered, the possession of Doraisami Kothan was only that of a tenant-at-will and therefore on his death there was nothing which the first defendant would inherit, and that after 1940 the possession of the first defendant would be without any right and only that of a trespasser. In this view too he contended that the plaintiff's suit would be barred by limitation as the 1st defendant should be held to have acquired title to the property by adverse possession. I see no substance in these contentions Mr M S Venkatarama Iyer, learned Counsel for the respondent urged that Exhibit A-4 was undoubtedly a lease which required registration under section 107 of the Transfer of Property Act, as it is a lease for more than one year. From this he contended that if for want of registration Exhibit A-4 becomes inadmissible and useless, section 106 of the Transfer of Property would be attracted and the position would be that there is no contract with regard to the terms of the lease, and that as the lease was not for agricultural purpose, statutorily, the lease would be deemed to be a lease from month to month terminable on the part of either the lessor or lessee by issue of 15 days notice. According to learned Counsel the fact that Exhibit A-4 provides that rent is payable at indefinite intervals extending over years or that the terms of the lease are such that it is impossible to regard it as monthly lease, is wholly irrelevant. According to learned Counsel section 106 would apply only to such cases and the section statutorily regards the lease from month to month In support of his contention learned Counsel referred me to the statement of law in Mulla's Transfer of Property Act, 6th Edition, at page 106, and also drew my attention to the decision of the Calcutta High Court in *Sheik Akloo* v. *Sheikh Manan*[4], in which the facts were similar to these in the present case. In that case also the terms of the lease which was unregistered showed that it was annual tenancy and the rent was payable every year and the identical point was dealt with by the learned Chief Justice in these terms.

"Then arises the next question whether from that fact, it can be presumed that the tenancy was an annual tenancy I should be prepared to follow what was said by my learned brother Mr Justice Mookerjee in the case *Durgi Nikarini* v *Goberdhan Bose*[5] namely, 'it may possibly be accepted as a proposition generally true, that, as indicated in *Wilkinson* v. *Holl*[6] the mode in which rent is expressed to be reserved affords a presumption that the tenancy is of a character corresponding thereto The rule, however, is not of universal application, and it was pointed out by Mr Justice Maule in *Atherstone* v *Bostock*[7] that the presumption of yearly taking from the rent being paid yearly does not apply to the case of lodgings and the same view is supported by the case of *Wilson* v *Abbott*[8] Now in this case there is nothing to rebut the presumption which I think ought to be drawn from the fact that the rent was to be an annual rent Therefore, the presumption ought to be drawn that the tenancy was to be annual tenancy, and so far that conclusion at which I have arrived is in favour of the appellant. Therefore, within the words of section 106 of the Transfer of Property Act, there would be a contract, namely, such as I have described a contract of tenancy between the plaintiff on the one hand and the defendant on the other, and an annual tenancy for which an annual rent of Rs 15 was to be paid, and, therefore, section 106, if it stood by itself, would not apply because there would be a contract to the contrary But unfortunately for the appellant there is section 107 which says that such a contract as that, a contract such as I have described, which reserves a yearly rent, can be made only by a registered instrument, and, inasmuch as there is no registered instrument in this case, that contract must be treated as invalid contract and as not existing Therefore, I am forced to the conclusion that this case does come within section 106, because there is an absence of a contract to the contrary inasmuch as the contract which was in fact made and was in fact held to exist by the Court of first instance was not put into writing and was not registered"

Reference has also been made to an earlier decision of the Calcutta High Court in *Debendra Nath Bhowmik* v. *Syama Brosanna Bhowmik*[9], in which the same aspect is stressed having regard to the express language in section 106 There also the document of lease was unregistered and it was an yearly tenancy, the rent stipulated being annual rent. It was held that as the lease deed was inadmissible under section 107, it was regarded as one terminable either by lessor or lessee by 15 days notice

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1 A.I.R 1941 All 306
2 A I R.1953 Cal 349.
3 A I R. 1925 Cal 1171
4 I L R 44 Cal 403 at 409
5. (1914) 20 C.L J 448, 454
6. (1837) 3 Bing N. C 508.
7 (1841) 10 L J C P. 114
8 (1824) 3 B & C 88
9 (1806) 11 C W N 1124

under section 106. It is unnecessary to multiply authorities in view of the clear language of section 106. Therefore the lease in the instant case was terminable by 15 days notice and was current when Doraisami Kothan died. During the currency of the lease the first defendant undoubtedly became entitled to and obtained possession of the property as the lessee, because it is a lease from month to month. It is not in controversy that such a lease has been validly determined as a result of the notice Exhibit A-6 The result therefore is that the first defendant is bound to surrender possession to the plaintiff The Second Appeal is dismissed with costs. No leave.

With regard to the memorandum of cross-objections it is clear that the lower appellate Court has committed a mistake in relying upon the decision in *Alagirisvami Kone* v. *Andhoni*[1] Having regard to the terms of the lease deed in that case, that decision has no application to the instant case In that case the lease deed contained a provision that on the termination of the lease when the lessor terminated his possession, the lessee would be entitled to the cost of the construction of improvement which was effected on the property with the result it could be said that when the lessee effected improvements, he did them in good faith and on the presumption that he would be entitled to the value thereof That principle will have no application to a case in which the lease deed contains a contrary provision Exhibit A-4 contains a clear covenant that on the termination of the lease the lessee should hand over possession of the property along with the building, trees, etc. without any claim for compensation The first defendant cannot blow hot and cold If he relies upon the lease deed, Exhibit A-4 he is not entitled to get compensation. If the lease deed becomes inadmissible for went of registration, under section 51 it is clear that a lessee would not be entitled to compensation in respect of any improvements effected on the property demised Mr Venkatarama Iyer drew my attention to the decision of the Privy Council in *Ariff* v *Ra Judunath Majumdar Bahadur*[2], and the observations therein at page 546 to the effect that if a lessee erects any building not in a mistaken belief of his rights in regard to the land but in assertion of rights which he correctly believes to be his but which ultimately turn to be unfounded in law, he cannot claim compensation. From this it will be clear that the 1st defendant is not entitled to any claim for compensation The result is the Memorandum of Cross Objections is allowed No Costs in Memorandum of Cross Objections No leave

V K ——— *Appeal dismissed;*
Memorandum of cross-objections allowed

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K SRINIVASAN.

Veerappa Mudaliar .. *Appellant**

v.

Venugopala Mudaliar and others .. *Respondents.*

Will—Construction—Rule against inference of intestacy—Scope

Civil Procedure Code (V *of* 1908), *section* 100—*Finding as to age—Interference in Second Appeal.*

Specific Relief Act (*I of* 1877), *section* 42—*Suit for mere declaration of title to properties in the possession of cultivating tenants—Relief of possession not asked for—Maintainability.*

It is true that intestacy should not be lightly inferred and that the Supreme Court in *Pearey Lal* v. *Rameshwar Das*, (1964) 1 S C J 852 has laid down that where one of the two reasonable constructions would lead to intestacy, that would be disregarded in favour of a construction which does not create any such hiatus. But what is of vital importance in the construction of a will is to give effect to the intention of the testator When the Supreme Court said that intestacy should not be inferred it dealt with it as a question of the construction of the terms of the will. But where, as in the instant case, the terms of the Will are so clear that it is not by reason of any construction intestacy is inferred in respect of some of the properties that decision cannot apply

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1 (1961) 1 M.L J 158 2 (1931) L.R 58 I A 91 60 M.L J 538 (P C)

*S.A. No. 846 of 1961 30th April, 1965.

The finding with regard to the age of a person at a particular time is a finding of fact which cannot be further canvassed in Second Appeal.

A suit for a mere declaration of title without a prayer for possession will be maintainable, when the declaration of title is sought in respect of properties in the possession of cultivating tenants governed by the Madras Cultivating Tenants Protection Act which prevents actual possession being taken, the tenants being entitled to continue in possession.

Appeal against the Decree of the Additional Subordinate Judge, Mayuram, in Appeal Suit No. 164 of 1959, preferred against the Decree of the District Munsif of Sirkali in Original Suit No. 28 of 1957.

R. Gopalaswamy Ayyangar and *R. Balasubramania Ayyar*, for Appellant.

R. Sundaralingam, T. K. Subramania Pillai, T. R Ramachandran and *S Jayaraman* for Respondents

The Court delivered the following

JUDGMENT.—One Doraiswami Mudaliar married Balamani Ammi in 1921 On 14th April, 1921, he executed a registered settlement deed gifting items 1 and 2 of the suit properties to her absolutely, but with a restraint on her powers of alienation only during his lifetime A short while before his death in 1940, he had purchased items 3 and 4 and a suit for recovery of possession of these items was pending when he died Even prior to this purchase he had executed a will in 1938, bequeathing certain properties to some charities of which he had constituted the first defendant, who is the appellant, as the manager In the suit relating to items 3 and 4, the first defendant applied to the Court to be brought on record as the legal representative The first plaintiff in the suit who is a son of a divided brother of Doraiswami, made a similar application The latter was rejected and the first defendant was brought on record as the legal representative The first plaintiff set up title claiming rights under another will of Doraiswami which he propounded, but that was found against in certain other proceedings Balamani died in 1956 Claiming that succession to the estate of Doraiswami opened on the occurrence of her death, the plaintiff, the sons and daughter of a divided brother of Doraiswami brought the suit. They attacked the charity and the trust said to have been created by the will of Doraiswami as illusory They also claimed that items 3 and 4 continued to be enjoyed by Balamani, who also dealt with these items of properties by way of mortgage and lease With regard to items 1 and 2, Balamani was claimed to be the absolute owner It appears that in the will of the year 1938, Doraiswami had purported to deal with items 1 and 2 as well The plaintiffs alleged that such a devise in respect of these items could not be effective as Balamani was the absolute owner of these properties and they were not properties of the testator which he could validly dispose of. The plaintiffs accordingly sought a declaration of their title to items 1 to 4 Possession was not, however, asked for, as defendants 2 and 3 were entitled to be in possession as cultivating tenants

In addition to this relief, certain jewels belonging to Balamani had been entrusted with a friend of the family, one Ramaswami Padayachi This person is said to have deposited them in the Tanjore Permanent Bank The legal representatives of Ramaswami Padayachi were impleaded as well as the Bank for the recovery of these jewels.

The first defendant, who is the contesting defendant and whose pleas have been rejected both by the trial Court and the lower appellant Court, alleged that the settlement executed in 1921 by Doraiswami in favour of Balamani was ineffective, as Balamani was on that date a minor and incapable of making or accepting a contract. It was also alleged that Doraiswami was dealing with the properties as his own, and in fact, he made a disposition of these items of properties items 1 and 2 as well under his will, whereunder he granted Balamani the right of enjoyment till her lifetime The properties were thereafter to pass to the first defendant. It was also claimed by the first defendant that items 3 and 4 were also covered by the will, it being the intention of Doraiswami that all of these properties should comprise the estate set apart for charity. It was further alleged that the first defendant had

been in possession of the properties all along and that Balamani was not in exclusive possession as claimed With regard to the jewels, the first defendant again asserted that the jewels were gifted to him by Balamani and that for that reason he alone is entitled to the jewels.

The principal issues which the trial Court had to decide were : Whether the settlement of the year 1921 was valid; Whether items 3 and 4 were also covered by the will ; Whether the first defendant had perfected his title by adverse possession in respect of these items ; Whether Balamani was bound by the disposition of items 1 and 2 and lastly, whether the alleged gift and the claim of the first defendant in that regard were true.

Upon all these issues, the trial Court found against the first defendant. The first defendant canvassed this decision in appeal and the very same questions were set down for consideration by the lower appellate Court The lower appellate Court took note of the circumstances and concluded that the evidence established that Balamani was a major on the date of the gift, and after the execution of the settlement deed, Doraiswami ceased to be the owner of items 1 and 2. The lower appellate Court also took the view that the properties purported to be covered by the will having been set out in detail in the schedule thereto, and items 3 and 4 not having been specifically dealt with by the will it could not be regarded as having disposed of these properties in any manner. It was also noticed that at the time of execution of the will, Doraiswami had not even acquired the properties in question. There was no clause in the will which purported to deal with his after-acquisitions. The lower appellate Curt thus rejected the contention of the first defendant that the will was of sufficient amplitude to include a devise of these properties as well.

The contention that Balamani acquiesced in the provisions of the will, which purported to deal with her absolute estate in items 1 and 2 and to cut it down to a mere life estate, and that as she was given certain other properties under the will which she took she cannot be permitted to object to this provision was also rejected ; that is to say that argument that though Doraiswami having purported to deal with the properties of Balamani, when Balamani took certain properties devised to her under the will, she must be deemed to have elected to stand by the provisions of the will and cannot put forward the claim that her absolute interest in the estate in these items could not have been dealt with by the will was not accepted. Balamani having died, there were only circumstances which would give any clue to the intention of Balamani, whether she elected to abide by the will, or not. That being so, the lower appellate Court examined the evidence in this regard and was satisfied that there was nothing to show that Balamani acceped the will. The doctrine of election, therefore, did not come into play. The plea of adverse possession set up by the first defendant was also negatived, as it was undeniably established that in the subsequent transactions in respect of items 3 and 4 Balamani took part and was not excluded by the first defendant, who claimed to be in possession. Lastly, the plea of gift was also negatived. The appeal failed on all the points

The first defendant has preferred this Second Appeal and the same questions are canvassed over again Another point raised by the appellant is that the suit itself was bad, for possession was not asked but only a declaration was sought.

I shall deal first with the question whether the will contains any term or any indication that items 3 and 4 were also intended to be dealt with. The will was executed in June, 1938. Items 3 and 4 were purchased by Doraiswamy Mudaliar in 1939, long after the will. At the time of the exectution of the will, therefore, he did not expect that any subsequent acquisitions would be made by him. He was on that date 68 years of age and executed the will in anticipation of near demise. He stated in the will that he had become old and that he did not expect to live much longer. He had no issue and no expectation of any issue Nor were there any persons whom he was willing to take in adoption. Thereafter, he proceeded to say that the properties belonging to him were set out in A and B Schedules and they were disposed of in the following manner. He then stated that the properties in the

A Schedule which included items 1 and 2 in the suit, were to be enjoyed by Balamani, his wife, without powers of alienation during her lifetime and after her lifetime should become part of the charity estate provided in the will. He then dealt with the B Schedule which he constituted as the charity estate, and appointed the first defendant as the hereditary trustee and manager thereof. The ususal clause that generally finds place in a will which provides for the devise of properties acquired after the date of the will by the testator is absent in this case. It is principally on this circumstance and in view of the express statement of the testator that he was dealing with A and B Schedules only that the Courts below took the view that items 3 and 4 were not covered by the will in any manner whatsoever. The opening paragraph of the will, the substance of which has been extracted above, clealy indicates that at that time the testator had no intention of acquiring any further properties and any consciousness of making a disposition in respect of such properties could not have been present in his mind at all. It is true that intestacy should not be lightly inferred but in the peculiar circumstances of the case, I am unable to see how the concurrent view expressed by the Courts below that items 3 and 4 were not covered by any term of the will or by any manner of interpretation of the clauses of the will can be said to be incorrect. Mr. Gopalaswami Ayyangar, learned Counsel for the appellant, has referred to *Pearey Lal* v. *Rameshwar Das*[1], where their Lordships say that in construing a will, the will should be read as a whole in order to get at the intention of the testator. If there is a conflict in the terms of the will such construction as would give effect even to a conflicting expression rather than such construction as would render the expression inoperative should be given. Their Lordships also say that all parts of a will should be construed in relation to each other and it is a well-recognised rule of construction that the Court will look at the circumstances under which the testator makes the will, such as the state of his property, of his family and the like. In another part of the judgment, they also say,

"Further, where one of the two reasonable constructions would lead to the intestacy, that would be disregarded in favour of a construction which does not create any such hiatus."

Mr. Gopalaswamy Ayyangar relies on these observations and argues that the intention of the testator was to create a charity estate, for he had no one to provide for except his wife, and, therefore, in so far as the properties which were after-acquired and which were not in terms disposed of under the will are concerned, it must be taken that they should form part of the trust estate. I am unable to accept that that result flows even on an application of this decision. What is of vital importance in the construction of a will is to give effect to the intention of the testator. When their Lordships say that intestacy should not be inferred, they dealt with it as a question of the construction of the terms of the will. But, where the terms of the will are so clear that it is not by reason of any construction of those terms that intestacy is inferred in respect of some of the properties, the decision cannot apply. If any one fact is clearer than another, it is that the testator had no intention at the time of executing the will of acquiring any further properties and he only wanted the properties that he was possessed of to be devoted to charity. As I have pointed out, there is no residuary clause in the will which could be relied upon in support of the intention, expressed in clear or ambiguous terms as it may be, in favour of any devise of any after-acquisitions. There is no doubt about the intention of the testator, and I must emphasise that it is not on a construction of the terms of the will that intestacy in respect of items 3 and 4 arose. It arose as a fact by reason of the express recitals in the will. I am accordingly satisfied that items 3 and 4 are not covered by the will and the first defendant can claim no right thereto as a legatee under the will.

It was somewhat vaguely argued that the first defendant is constituted a residuary legatee, and that as a residuary legatee, he is entitled to these items. Reliance is placed on paragraph 3 of the will.

"Excluding the properties set out for my wife out of the A Schedule, the balance which belongs to me and the B Schedule properties are decided for charity."

1 (1964) 1 S.C.J. 85 : A.I.R. 1963 S.C. 1703.

On behalf of the appellant, it is urged that the expression *balance* refers to the balance of the properties not expressly disposed of by the will and that should take in items 3 and 4 In the context, however, I am not prepared to accept this argument. The testator was only referring to the properties in the A Schedule other than those bequeathed to his wife The balance in the context does not refer to the balance of the properties remaining after all the dispositions had been given effect to. Nor is there any term in the will which expressly constitutes the first defendant as the residuary legatee. This contention has accordingly to be rejected.

The next question relates to items 1 and 2 The contentions of the appellant in this regard are two-fold Firstly, it is argued that there was no valid settlement at all in 1921 and that, therefore, Balamani did not acquire an absolute estate, in these items. It is contended that even assuming that she had an absolute estate she was a consenting party to the mode of disposition contained in the will, so that it may be validly assumed that there was a revocation of the settlement by mutual consent. Secondly, it is claimed that Balamani elected to take the benefits conferred under the will and she cannot, therefore, be permitted, to deny the binding nature of the will

On the question whether the settlement was operative or not, Balamani's age on the date of the settlement came in for examination. The learned District Munsif dealt with the several documents in which Balamani's age has been given, more, or less approximately it might be. Now, Balamani was the third wife of Doraiswami, who had married her when he was somewhat advanced in years It is, not therefore, unlikely that he executed a settlement in her favour The document does not show that at the time of settlement, she was represented by any guardian. The learned District Munsif thought that Doraiswami Mudaliar could not have been unaware that if Balamani was a minor, she should have been properly represented by a guardian in order to make that settlement effective. It was certainly not his intention at that point of time to make a spurious settlement The evidence on behalf of the first defendant did not purport to establish the age of Balamani at the relevant time It was only vaguely stated that the conversations that took place at the time of the settlement indicated that Balamani was 16 years of age. The age of Balamani as given in the record of her depositions in certain other proceedings and in an affidavit and lastly in the will itself was considered by the learned District Munsif, who observed .

"Far from being any proof that Balamani was a minor at the time of the settlement there are indications to the contrary on the basis of the age given in the registered will which is admitted to be correct."

This view was accepted by the lower appellate Court as well. It seems to me that this is a finding of fact which cannot be further canvassed in this Second Appeal.

Nor am I impressed with the argument that there should have been a revocation of this settlement by mutual consent Balamani was alive for a considerable number of years after her husband's death, and though she seems to have admitted that she was aware of the execution of the will, at no time was there any admission proceeding from her that she obtained the properties only under the will. Though Doraiswami must have been aware that he had executed the settlement in her favour, he did not expressly refer to the rights created thereunder in the will Had anything been stated in the will in that regard and it was shown that Balamani was a consenting party to the disposition of these properties, one could perhaps give some measure of credence of this contention It was only in connection with the suit seeking to recover items 3 and 4, when the first defendant put forward his claims to be brought on record as the legal representative of Doraiswami that any question relevant to the will arose, and Balamani appears to have sided with the first defendant at that time. In her deposition in that suit and the connected proceedings, she stated that her husband executed the will after consulting her and other friends. The trial Court noticed that even then she maintained that the properties had been settled on her absolutely and that she was in possession, and

for these reasons he declined to accept the contention that she gave up her rights under the settlement deed.

I am not disposed to disagree with this evaluation of the evidence. Where a person had certain rights in properties and that person is no longer alive to say what rights she claimed an inference of such a far-reaching nature that that person gave up the rights should not be lightly made Apart from the effect which the doctrine of election may have and independently of it, I am not disposed to agree with the contentions on behalf of the appellant that Balamani voluntarily gave up her rights

On the question of election, no specific plea was taken by the first defendant. The suit is by the plaintiffs who claimed as the reversioners to the estate of Doraiswami, succession to which opened on the death of Balamani. Doraiswami died in 1940 and the will came into effect on his death Balamani died in 1956 or thereabouts. Now, any question of election is a mixed question of fact and law. When the possession of the properties by Balamani during all these years is not inconsistent with her possession as the absolute owner or even with her possession as a limited owner under the terms of the will, no inference that she made any election, can be made. Under the will, Doraiswami purported to grant her a life estate in items 1 and 2 as well as a house. Even apart from the terms of the will, Balamani would have been entitled to the house, for if it had not been devised differently, no other person would have claimed it Her possession and enjoyment of items 1 and 2 and the house are equally consistent with her possession and enjoyment as the heir of her husband. Mr Gopalaswami Ayyanagar argues that if Balamani took the house under the terms of the will, she must equally be bound by the other terms of the will, which cut down her absolute right in items 1 and 2 to a limited estate. But, as far as I can see, Balamani's possession of the house is not necessarily referable to the will Unless one can postulate that it was a benefit conferred by the will and Balamani took it as such benefit, the doctrine of election cannot be invoked against her to prevent her from insisting upon her absolute rights in items 1 and 2 Learned Counsel for the respondents-plaintiffs points out that there is no evidence to show in what manner the house was enjoyed, whether Balamani took the house under the terms of the will or otherwise. There is in fact no plea and no proof in that regard All of these questions are now raised long after Balamani's death and unless the first defendant can establish that Balamani consciously stood by the terms of the will and accepted the benefits conferred thereunder, the first defendant-appellant cannot plead the doctrine of election.

On the plea of adverse possession, there is a concurrent finding of both the Courts It is not denied that after the death of Doraiswami the first defendant brought himself on record in the connected suit and obtained possession of the property items 3 and 4 through Court as representing Doraiswami, the contention put forward by him is that he had been in adverse possession of these properties, but this plea stands negatived by the admitted circumstance that, in 1943, these properties were mortgaged for discharging the debts of Doraiswami and Balamani was a joint executant of that document. If the plea of the appellant that these properties had been devised for the trust estate is true, it is doubtful if he would have agreed to execute the mortgage for discharging the debts of Doraiswami Whatever remedy the creditors might have had against that estate is beside the point. It is even more doubtful if he would have permitted Balamani to join in the execution of the mortgage That mortgage was discharged only in 1953. Till that date, therefore, the first defendant cannot be said to have put forward any hostile claims against Balamani, and if that should be so, I can hardly see how the plea of adverse possession can be maintained On the question of the jewels, the finding is that the alleged gift has not been established I am unable to interfere with that finding in Second Appeal.

All the contentions material to the defence of the first defendant fail.

Lastly, it was urged that a suit for mere declaration is not maintainable. It has been established by the evidence that there are tenants in possession who are

entitled to be there under the Cultivating Tenants Protection Act and that, therefore, the plaintiffs cannot ask for possession. In *Ratnasabapathi Pillai* v. *Ramaswami Aiyer*[1], it was held that when a trustee of a temple, who had been ousted from possession by his co-trustees, sued for a declaration that his dismissal was invalid and for an injunction to restrain the co-trustees from interfering with his rights, the suit was held not maintainable in the absence of prayer for consequential relief. But that decision clearly proceeded on the footing that he having been in possession of the properties as co-trustee and having been ousted therefrom, ought to have sought for possession and not for mere declaration. In *Kandaswami* v. *Vagheesam*[2], a suit for a declaration of the plaintiff's title to the office of Mahant of a Mutt, but without a prayer for possession of the properties was held to be bad, when it was not alleged that the plaintiff was in possession and that was the reason why no decree for possession was sought. But these are cases where possession could have been obtained by the suitor. But these are cases where there is a statute law which prevents actual possession being taken, the tenants, being entitled to continue in possession, it seems to me that the suit as framed cannot be held to be not maintainable. Such a question arose in the Punjab High Court in *Ganga Ram and others* v. *Shiv Lal*[3]. The learned Judge observed that at page 569:

> "The defendant has protection of his status as a tenant under section 6 of Punjab Act (X of 1953) in spite of the transfer of title under the pre-emption decree in favour of the plaintiff. Of course, that protection is subject to the terms of section 6 of that Act, but that is a matter which obviously cannot be in controversy in a civil Court, because it is a matter that will arise when eviction of the defendant as tenant is sought. Now, eviction of the defendant as tenant can only be obtained under the provisions of Punjab Act (X of 1953) and not in a civil Court. Thus the plaintiff cannot claim possession of the property as against the defendant as tenant in a civil Court ..... It follows that there is no consequential relief that the plaintiff could claim in the civil Court and so on this consideration he cannot be denied declaration he seeks."

A similar view has been expressed in *Seshu Reddi* v *Rama Raghavareddy*[4], where the learned Judge observed thus:

> "A suit such as the present is certainly maintainable where the only relief prayed for is granting a declaratory decree, because the consequential relief to which he may be entitled to *viz.*, recovery of possession of the property, is not one which a civil Court .. can grant."

The plea that the suit as brought is not maintainable accordingly fails.

The result is, the Second Appeal fails and is dismissed with costs. Leave granted.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE M. NATESAN

Ponnuswamy Reddiar . *Appellant**

v.

Vasantha (minor by mother and next friend Kannammal) .. *Respondent.*

Evidence Act (I of 1872), section 114—May presume—Woman leaving lawfully wedded husband—Living with another in illicit intimacy from about ten days of her leaving husband—Birth of a child within seven months after leaving husband—Natural birth after full period of gestation—No evidence contra—Not the illegitimate child of the other man—Presumption.

The first defendant and a woman had been living together in illicit intimacy from about ten days after she left her lawfully wedded husband. A child was born within seven months after she left her husband.

On the question whether the first defendant was the father of the child.

Held, there is no evidence that it is not a natural birth after the full period of gestation of about 280 days. Section 114 of the Evidence Act can be relied upon in such a case having regard to the common course of natural events and human conduct. If it is not a case of premature delivery, the coitus leading to conception should have been some two months prior to the woman joining the first defendant after leaving her husband. In the absence of a finding that the first defendant was

1. (1910) I.L.R. 33 Mad. 452: 20 M.L.J. 301.
2. I.L.R. (1942) Mad. 13 (F.B.): (1941) 2 M.L.J. 463.
3. I.L.R. (1964) Punj. 555 (F.B.).
4. A.I.R. 1964 A.P. 118, 123.

*S.A. No. 1080 of 1962. 29th July, 1966.

keeping the woman as his concubine at the relevant period prior to the marriage one cannot assume that he is the father of the child

Appeal against the Decree of the District Court of North Arcot in Appeal Suit No. 547 of 1960, preferred against the decree of the Court of the District Munsif of Tirupattur in Original Suit No 622 of 1959.

T. V. Balakrishnan and *N Vanchinathan*, for Appellant

T. R. Ramachandran and *R. Sivapunyam*, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant in a suit for maintenance by an illegitimate girl represented by her mother as next friend is the appellant before me. The suit was filed *in forma pauperis* and admittedly the mother of the illegitimate child was for sometime at least a concubine of the first defendant The case on behalf of the plaintiffs mother and daughter, the mother figuring as the first plaintiff, was that in February, 19 5 that is at the end of Thai 1955 the mother was got married to one Thirunavukkarasu, obviously against her desire, that she went to live with him at Gundureddiyur and was there with him just for a period of ten days and after that short stay, she joined the first defendant in his village as his concubine. The evidence, clear and clinching is, that at any rate after leaving Thirunavukkarasu who has figured as P W. 1, the first defendant has been keeping the woman as his concubine. It is found by both the Courts below that when the mother left her lawfully wedded husband preferring the company of the first defendant, there was a Panchayat at which the marriage was dissolved according to caste custom The dissolution of the marriage is stated to be in or about the middle of February, 1955. The woman who has been living with the first defendant as his concubine gave birth to a girl on 29th August, 1955, that is about seven months after she left her husband. It is this girl who is the second plaintiff in he case and for whom maintenance is claimed. In both the Courts below and here in Second Appeal the contention on behalf of the first defendant has been that this girl was not his and under section 112 of the Evidence Act she must be presumed to be the child of the lawfully wedded husband who has figured as P W. 1

The Courts below have awarded maintenance to the child at Rs. 5 per month. Both the Courts below are of the view that there was such animosity between the woman and P W 1 whom she had taken as her husband that it is unlikely that they had any intercourse. While it may be that they had been living together for a period of ten days, the Courts below would hold that the husband had no access. A perusal of the judgment of the Courts below leaves one with the impression that the Courts below demanded evidence of not merely opportunity for intercourse but evidence that there was intercourse Certainly that is not the requisite of section 112.

In this case, in my view, it is unnecessary even to apply section 112 of the Evidence Act as the question for consideration is whether the first defendant was the father of this girl. The finding is to the effect that the first defendant and this woman had been living together in illicit intimacy from about ten days after she left her husband. This child was born within seven months after she left her husband. There is no evidence that it is not a natural birth after the full period of gestation of about 280 days. In a case of this kind we may rely on section 114 of the Evidence Act having regard to the common course of natural events and human conduct. If it is not a case of premature delivery the coitus leading to conception should have been some two months prior to the woman joining the first defendant after leaving her husband In the absence of a finding that the first defendant was keeping this woman as his concubine at the relevant period prior to the marriage, one cannot assume that he is the father of the child It follows that the conclusion that this child is the illegitimate child of the first defendant cannot be sustained Neither of the Courts below have addressed themselves to this aspect of the matter and even on the question of access they have gone wrong On this view, the claim for maintenance has to fail

However Counsel desire to record what has happened after I posted the case for this day for judgment. Having regard to the fact that this woman had been his concubine, it is stated, that the first defendant offered to pay and paid her Rs. 350 in cash to be used for the benefit of the minor girl Learned Counsel appearing for the minor child represented by her mother as guardian stated that the amount has been paid into the hands of the mother. Learned Counsel appearing for the first defendant further states that the amounts if any deposited by him towards maintenance in the Lower Court pursuant to the decree may be withdrawn by the guardian herself despite the fact that the decree for maintenance is now being reversed. There will be an order that the amounts if any already deposited in Court by the first defendant towards the decree may be paid over the second plaintiff represented by her guradian without any security.

In the result, subject to the above direction as to payment out of the amount deposited in Court to the second plaintiff's guardian, the Second Appeal is allowed. If any costs have already been paid by the first defendant, the plaintiffs will retain the same The order as to Court-fees made by the trial Court will stand. Otherwise there will be no order as to costs.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Natesa Pillai *alias* Dorairaja Pillai .. *Appellant**

v

The Public Prosecutor, Pondicherry and another .. *Respondents.*

French Code of Criminal Procedure, Articles 202 (2), 216—*Receiver*—Partie civile *moving for the prosecution of Receiver and for damages—Found guilty of breach of trust by trial Court as a correctional Court—Award of damages to* partie civile—*Appeal by Receiver—Acquittal—Appeal to High Court by* partie civile *by way of cassation—No jurisdiction to interfere with acquittal at the sole instance of* partie civile—*Liability of Receiver, a civil one—Open to* partie civile *to take civil proceedings against Receiver*

There is no jurisdiction to interfere with the order of acquittal, at the sole instance of the *partie civile* by the High Court in the exercise of its power of cassation

Article 202 (2) of the French Code of Criminal Procedure confers a right of appeal (1) to the accused party or the persons found liable, (2) to the *partie civile* confined exclusively to his civil interest, (3) to the Forest Administration, (4) to the Public Prosecutor, and (5) to the Public Prosecutor of the Court of Appeals Article 216 confers on the *partie civile*, the accused, the Public Prosecutor and the persons made civilly responsible, the right to appeal in cassation against an order. It is clear that when the *partie civile* under Article 216 appeals for relief by way of cassation, it must be read with Article 202 and therefore the appeal must be confined exclusively to his civil interest. This restriction, however, has an exception. If the party who moves the Court of Cassation in appeal is the Public Prosecutor, the entire decision can be at large and the *partie civile* may also agitate his rights within the forum of such an appeal But, if there is no appeal by the Public Prosecutor the provisions in Article 202 (2) restricting his right exclusively to his civil interest will apply The *partie civile* cannot seek for reversal of the finding of acquittal, if the Public Prosecutor had not appealed.

The relationship of the Receiver though appointed by Court, is governed by contract, and his liability would be a civil one In a case decided as a correctional matter, the acquittal of the accused will leave open to the *partie civile* a right to pursue his civil remedy in independent civil proceedings, unlike in the case of an acquittal by the Court of Assises of an accused, charged for a major crime.

Appeal against the Judgment of the Tribunal Superior d' Appeal, Pondicherry Appeal No 131 of 1964 against No 60, Tribunal de Premiere Instance, Karaikal.

S. M Amjad Nainar, for Appellant.

J. Stanislas for *A. Bala Pajanor*, *V. R Venkataraman* and *J. Stanislas*, for Respondents.

The Public Prosecutor for Pondicherry at Madras, for State

* S.A. (Crl.) No. 541 of 1965 (P). 9th September, 1966.

The Court delivered the following

JUDGMENT.—In the course of certain refere proceedings for urgent orders under the French Civil Law, the Court of First Instance, Karaikal, appointed on 24th October, 1941, one Amalu Pillai, as Receiver of certain properties. The present appellant, Natesan Pillai alias Doirairaja Pillai, was a party in the refere proceedings. It appears that Amalu Pillai had received, in the course of his duties as Receiver, income from the properties in his custody but he was able to account only for a part of it, and he failed to account for a fairly large sum, viz., Rs. 32,924. Subsequently the Receiver was discharged, and the Court appointed another person as Receiver. But Natesa Pillai *alias* Doirairaja Pillai was aggrieved against the conduct of the Receiver in not accounting for the above sum of money, and he moved the authorities for prosecution of the Receiver, and he also as *partie civile* claimed damages from the Receiver to be awarded by the Criminal Court. The matter was tried by the Court of First Instance at Karaikal as a *correctional* offence under the French Criminal Law, involving the contravention of Articles 406 and 408 of the Code Penal (criminal breach of trust). The learned Judge of the Court of First Instance found the Receiver guilty under the aforesaid provisions and sentenced him to undergo imprisonment for six months and to pay a fine of 200 frances. He also recognised the claim of Natesa Pillai as *partie civile* for the award of damages, and directed the accused to pay Rs. 24,924 as damages to be deposited in the Court of First Instance at Karaikal in accordance with the request of the *partie civile*. Against this decision the accused-receiver appealed, and the *Cour Superieur D'Appel* at Pondicherry in a short judgment acquitted him, making the following direction:

> " Whereas it concerns a purely civil contract violation of which is of the jurisdiction of the civil Court, therefore, the accused is to be discharged both from the penal sentence and from that of damages pronounced by the first Judge against him."

Against this order the *partie civile*, Natesa Pillai has filed this appeal before this Court requesting it to exercise the powers of the *Cour de Cassation*, under the French law, conferred on this Court under Central Act XLIX of 1962.

It was represented before me by the Counsel for the respondent-accused, as a preliminary objection, that in the circumstances of this case, the *partie civile* has no right to move this Court for relief by way of *cassation*. The relevant sections of the French law, in this connection, are Article 202, sub-section (2) and Article 216 of the French Code of Criminal Procedure (*Coded' Instruction Crimincile*). Article 202 says that right of appeal will be conferred (1) to the accused party or the persons found liable; (2) to the *partie civile*, but it will be confined exclusively to his civil interest, (3) to the Forest Administration; (4) to the Public Prosecutor; and (5) to the Public Prosecutor of the Court of Appeals. Article 216 confers on the *partie civile*, the accused, the Public Prosecutor, and the persons made civilly responsible, the right to appeal in *cassation* against an order. It is clear that when the *partie civile*, under Article 216 above cited, appeals for relief by way of *cassation*, it must be read with Article 202 above, and therefore the appeal must be confined exclusively to his civil interest. This restriction, however, has an exception. If the party who moves the Court of *cassation* in appeal is the Public Prosecutor, the entire decision can be at large, and the *partie civile* may also agitate his rights within the forum of such an appeal. But, if there is no appeal by the Public Prosecutor, the provision in Article 202, sub-section (2), restricting his right exclusively to his civil interest will apply. Thus, it has been held in regard to the right of appeal under Article 202.

> " In default of appeal by the Public Prosecutor, the judgment of acquittal will acquire, as regards *Action Publique* (Prosecution), the finality of a matter decided (*Chose Jugee*), the *partie civile* will be able to raise in appeal only such matters as concern solely his civil interest, and the Court in such an appeal will not be able to award punishment to the accused acquitted by the First Court" (Crime 26 January, 1944—*Dalloz, Recueil Analytique de jurisprudence et de legislation* (*hebdomadaire*), *annee* 1944, Jurisprudence, page 108).

In this case there is no appeal by the Public Prosecutor. Therefore the *partie civile* cannot seek for reversal of the finding of acquittal.

14

As regards the contention about the civil liability of the Receiver, the Court of appeal at Pondicherry has found that even though the Receiver, is an officer of the Court, his relationship is governed by contract This conclusion is well supported by authority. There is also the further question that in a case decided as a *Correctionel* matter, the acquittal of the accused will leave open to the *partie civile* a right to pursue his civil remedy in independent civil proceedings, unlike in the case of an acquittal by the Court of Assises of an accused, charged for a major crime. The Commentary of *Pratique Criminelle* by Faustin Helie at page 91 has this to say

" It follows from Articles 191 and 212 of the *Code d' instruction Criminelle* that the Tribunals Correctionel, ceasing to have jurisdiction to deal with the offence, when they declare that the facts do not constitute a *Delit* or contravention, are incompetent for deciding on the question of the damages claimed by the *partie civile,* because there is no provision of law which gives them a right to decide on the civil right separately from the *Correctionel* prosecution, therefore, the action in damages will remain intact for being carried before the civil jurisdiction "

This observation in the commentary is based upon the decision of the Court of *cassation* made on the 21st of April, 1904

In the light of the foregoing observations, I am of opinion that there is no justification to interfere with the order of acquittal, at the sole instance of the *partie civile* by this Court in the exercise of its power of *Cassation* Adopting the reasoning mentioned in the Commentary of *Faustin Helie* above cited, the acquittal of the accused by the Correctionel Court will leave in tact the remedy of the *partie civile* against the Receiver for damages in the civil Court, and it will be for him to take appropriate steps as and when advised, for that purpose. The appeal is dismissed with the above observations

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

K. Visalam .. *Petitioner**

v.

The Additional Authorised Officer (Land Reforms), Nagapattinam, East Thanjavur District .. *Respondent.*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), *sections* 5, 17, 62 *and* 72—*Cultivating tenant in possession of lands as tenant—Excess over the tenant's ceiling area—Reverter to landlord—Authorised Officer—Notice to take possession of such surplus land and for distribution for landless persons—Validity—Writ under the Constitution to quash.*

The petitioner-landlord owned 5 acres and 87 cents The total holding of the tenant as tenant was 5 acres and 94 cents in standard acres. The Authorised Officer took proceedings under section 62 of the Act to take over the excess holding in the hands of the tenant and for distribution to landless persons for cultivation under the Act. The petitioner claiming the right of reverter of such excess over the tenant's ceiling area under section 17 of the Act, applied under Article 226 of the Constitution to quash the proceedings of the Authorised Officer

Held, the writ will issue quashing the proceedings of the Authorised Officer Under section 17 there will be a reverter to the landlord of the excess of the holding in the hands of the tenant

A " tenant " is defined by the Act to include a cultivating tenant When section 17 (1) speaks of ' any person as a tenant ' it has to be taken that the word ' tenant ' there means a cultivating tenant, in the present context, and he will be governed by Chapter VIII and for purposes of section 5, he will not come within its ambit so as to enable him to hold 30 standard acres A separate ceiling is fixed for a tenant under section 60 Therefore under section 17 (1) where a tenant or cultivating tenant's holding is in excess of the 5 standard acres, the excess can be taken over but if the excess is less than the ceiling area allowed to a landowner, to the limit of the difference to make up 30 standard acres, the land in excess of the permissible holding in the hands of the cultivating tenant will revert to such landholder.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings before the respondent in MRII 13—S /MNG, and quash the notice issued in MR II-13/S/MNG/ (Form No 32) dated 18th January, 1966

*W.P. No. 884 of 1966. 28th September, 1966.

V Balasubramanyam and *V Kunchithapatham*, for Petitioner.

The Government Pleader, for Respondent

The Order of the Court was made by

Veeraswami, J—The petitioner who is a landowner seeks to quash a notice issued to her in Form 32 dated 18th January, 1966, under the provisions of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 The effect of this notice is that an extent of 94 cents as being in excess of a cultivating tenant's ceiling area would be dealt with under Chapter VIII of the Act The petitioner says that the extent of 94 cents should revert to her under section 17 (1) The question will turn on the construction of sections 5 and 17 and some of the provisions in Chapter VIII.

Section 5 (1) (*a*) defines the ceiling area in the case of a person or a family. But this provision opens with the words ' subject to the provisions of Chapter VIII '. Chapter VIII relates to a cultivating tenant's ceiling area Section 59 limits the operation of this chapter to a period of three years, now extended to six years from the date of publication of the Act The next section defines the cultivating tenant's ceiling area to be five standard acres held by a person partly as a cultivating tenant and partly as owner or wholly as a cultivating tenant There is an *Explanation* to this section to the effect that the expression cultivating tenant will include any tenant who is in actual possession of land, though he does not contribute his own physical labour or that of any member of his family in the cultivation of such land. Section 61 requires a person holding land as a cultivating tenant to furnish returns in certain cases. Section 62 empowers the Authorised Officer to take possession of land in excess of the cultivating tenant's ceiling area In respect of the land taken possession of under that section, there is the liability under section 63 on the Government to pay rent. The lands so taken possession of are intended under section 64 to be distributed by the Authorised Officer in the manner indicated The rest of the provisions in this Chapter are perhaps not relevant for the instant purpose except section 72 which says that the provisions of this Chapter shall subject to the provisions of section 17 have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Act This Chapter has an overriding effect and will prevail notwithstanding anything inconsistent therewith contained in the Act, but such effect of the Chapter is, however, made subject to the provisions of section 17 which means that section 17 will prevail over Chapter VIII. Section 17 (1) states .

" Where any land held by any person as tenant is in excess of the extent of land which he is entitled to hold under section 5, the possession of the land in such excess shall, with effect from the date of the publication of the final statement under section 12 or 14 revert to the landowner where and to the extent to which the land of the landowner himself is not liable to be declared as surplus land in accordance with the provisions of this Act "

While this provision is relied upon by the petitioner, for the Government, it is said that it will not assist the petitioner to have a reverter of the 94 cents

On facts the petitioner owns 5 acres 87 cents The total holding of the tenant is 5 acres 94 cents, no part of which he owns.

A tenant is defined by the Act to include a cultivating tenant When section 17 (1) speaks of " any person as a tenant ", it has to be taken that the word ' tenant' there means a cultivating tenant in the present context. If he is a tenant and therefore a cultivating tenant, he will be governed by Chapter VIII and that means that for purposes of section 5, he will not come within its ambit so as to enable him to hold 30 standard acres The effect of the words ' subject to the provisions of Chapter VIII ' in section 5 (1) (*a*) is, in our opinion, that the ceiling area fixed by that provision will not apply to a case of a cultivating tenant for whom a separate ceiling is fixed by section 60 That being the case, when we come to section 17 (1) the meaning is clear that where a tenant or a cultivating tenant's holding is in excess of the extent of the ceiling area fixed for him, namely, 5 acres, the excess can be taken over, but if the excess is less than the ceiling area allowed to a land owner, to the limit of the difference to make up 30 standard acres, the land in

excess of the permissible holding in the hands of the cultivating tenant will revert to such landowner.

What the learned Government Pleader contends, however, is that the words 'subject to the provisions of Chapter VIII' in section 5 (1) (*a*) do not mean that a cultivating tenant in his capacity as a person cannot own what is permitted by that section In other words, section 5 (1) (*a*) has application to every person but not to a cultivating tenant But inasmuch as a cultivating tenant is also a person, to that extent section 5 will apply But in so far as he is a cultivating tenant, Chapter VIII will apply There is, therefore according to the learned Government Pleader, a ceiling within a ceiling, namely, that as a person he can have 30 standard acres but as a cultivating tenant he can have only 5 standard acres If section 5 (1) (*a*) is understood in that manner, it is obvious according to him, that section 17 (1) will not enable the petitioner to get a reverter of the 94 cents

We cannot accept this construction When section 5 (1) (*a*) says, "subject to the provisions of Chapter VIII" in the case of a cultivating tenant the only provisions to be looked at for application in his case are those found in Chapter VIII It follows that when section 17 (1) speaks of a tenant, he is a person who is governed by Chapter VIII Understood in that sense, which is the only sense in which the provisions aforementioned can be understood, we have no doubt that the petitioner is entitled to the benefit of section 17 (1) This will be more especially so, because section 60 itself defines a cultivating tenant's ceiling area as so many acres held by any person partly as a cultivating tenant, and partly as an owner or wholly as a cultivating tenant It is, therefore, not permissible to make a distinction of a cultivating tenant as a tenant for one purpose and as a person for another purpose, namely, for attracting section 5.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE N KRISHNASWAMY REDDY

A Kanniah and others . *Petitioners**

Criminal Procedure Code (V of 1898), sections 4 (h), 190 (1) (a), 249—Report of a police officer in a non-cognizable offence without investigation—Complaint—Cognizance can be taken of an offence, by Magistrate—Stay of proceedings as the accused were absconding—Order stopping proceedings illegal and without jurisdiction and void—Continuance of the proceedings originally instituted—Valid—Memo by Public Prosecutor of filing a fresh charge sheet—May amount to implied withdrawal

It is well-established that a report of a police officer in a non-cognizable offence without investigation as required under section 155 of the Code will be complaint as defined under section 4 (*h*) of the Code If the Magistrate took cognisance of an offence upon such a complaint, section 249 of the Code excludes stopping proceedings in cases instituted Any order passed by the Magistrate stopping such proceedings would be illegal and would be without jurisdiction and therefore void. As the stopping of the proceedings itself would be void, the question of revival does not arise The original trial started on the complaint filed by the police continues as there was no valid order preventing the course of the original trial.

Any memo filed by the Public Prosecutor that he would file a fresh charge-sheet would show that he was not pressing the case instituted on the original complaint. That will certainly amount to an implied withdrawal.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the Judgment of the Court of the Sub-Magistrate of Ponneri dated 19th July, 1965, and made in C M P No 1003-F in C C No. 687 of 1965, C M P No 1003/D/65 in C C No 685/65, C M P No. 1003-C/65 in C C. No 683/65 and C M P No 1003-A in C C. No 524 of 1965 respectively on his file.

P R Gokulakrishnan, for Petitioner in Crl R C Nos. 931 and 1023 of 1965.

S A Seshadri, for Petitioner in Crl R C. Nos. 1149 and 1151 of 1965.

Public Prosecutor, for State.

The Court made the following

ORDER —The petitioners in all these cases were charged for offence under section 5 read with section 7 of the Motor Vehicles Taxation Act by the Sub-Inspector

* Crl. R C Nos 931, 1023, 1149 and 1151 of 1965. 13th October, 1966.
Crl. R.P. Nos. 919, 1098, 1129 and 1131 of 1965.

of Police, Uttukottai. The Sub-Magistrate, Ponneri, took cognizance of the cases against the petitioners on a complaint filed by the Sub-Inspector of Police The petitioners did not appear in Court for a long time in spite of steps taken by the prosecution The proceedings were stayed under section 249, Criminal Procedure Code, with the sanction of the District Magistrate, Chingleput Subsequently, the case was revived and taken on file for trial by the Sub-Magistrate, Ponneri The petitiones raised several objections before the Sub-Magistrate, and mainly contended that the stay of proceedings amounted to an acquittal and that the revival of the case against the petitioners was illegal The learned Sub-Magistrate negatived their contentions and held that stopping proceedings under section 249, Criminal Procedure Code, with the sanction of the District Magistrate on the ground that the petitioners were absconding for a long time would not amount to an acquittal and that the revival of the proceedings was perfectly legal.

The learned Counsel for the petitioners contends that the order passed under section 249, Criminal Procedure Code, by the Sub-Magistrate, in stopping the proceedings is illegal and the said order must be deemed to be the withdrawal of complaint under section 248, Criminal Procedure Code, and the consequences of which should have been an acquittal of the petitioners. Section 249 of the Criminal Procedure Code is as follows —

> " In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the First Class or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction and may thereupon release the accused "

This section can be invoked only in cases instituted otherwise than upon a complaint Complaint is defined in section 4 (*h*) of the Criminal Procedure Code as allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown, has committed an offence, but it does not include the report of a Police Officer The report of a Police Officer is one that is contemplated under sections 170 and 173 of the Code of Criminal Procedure which is filed by a Police Officer as a result of investigation Under Chapter XIV of the Code of Criminal Procedure, an officer in charge of a Police Station has got power to investigate in cognizable cases In non-cognizable cases, a Police Officer can investigate only with the order of a Magistrate of the First or Second Class having power to try such cases or of a Presidency Magistrate The offence for which the petitioners were charged is undoubtedly a non-cognizable offence The Sub-Inspector admittedly had not obtained orders from the concerned Magistrate to investigate the case under Chapter XIV of the Code of Criminal Procedure. The report by the Police Officer in a non-cognizable case without getting permission to investigate the case as required under section 155 of the Code of Criminal Procedure, cannot be a police report contemplated under section 173 of the Code of Criminal Procedure Under section 4 (*h*) a police report is excluded from the category of complaint It is well established by the decisions that a report of a Police Officer in a non-cognizable offence without investigation as required under section 155, Criminal Procedure Code, will be a complaint as defined in section 4 (*h*) Vide *State G S S I* v *Ramaswami*[1], *Chidambaram Pillai* v *Emperor*[2], *Public Prosecutor* v *A V Ramiah*[3], *Mallikharjuna Prasada Rao* v *Emperor*[4]

Under section 190 (1) (*a*) of the Code of Criminal Procedure, a Magistrate can take cognizance of an offence upon receiving a complaint of facts which constitute such offence Under section 200, Criminal Procedure Code, if any complaint is made by a public servant, he need not be examined on oath

The learned Sub-Magistrate took cognizance of the case under section 190 (1) (*a*) as a complaint Section 249, Criminal Procedure Code, excludes stopping proceedings in cases instituted on complaints The order passed by the Sub-

1 (1963) 1 M L J 15 1963 M L J (Crl) 68 A I R 1963 Mad 160
2. I.L R. 32 Mad. 3 . 5 M.L J. 1.
3 (1958) 1 An W R 145 1958 M L J (Crl) 189. A I R 1958 A P 392.
4. (1933) M W.N. 876.

Magistrate in stopping the proceedings is clearly wrong as the cases against the petitioners were instituted on a complaint contemplated under section 4 (*h*) and 190 (1) (*a*) of the Code of Criminal Procedure. The order under section 249, Criminal Procedure Code, is therefore illegal.

Learned Counsel for the petitioners contends that these cases, being summons cases, the order passed by the Sub-Magistrate stopping the proceedings must be deemed to be the withdrawal of the complaint. I am unable to agree with this contention. The order passed by the Sub-Magistrate under section 249, Criminal Procedure Code, is an order passed without jurisdiction and therefore is void. It should be taken for all purposes that the order is *non est*. The result is that there was a gap in the trial between the date of the stopping of the proceedings and the revival of the proceedings. As the stopping of the proceedings itself is found to be void, the question of revival does not arise. The original trial started on the complaint filed by the police continues as there was no valid order preventing the course of the original trial. Learned Counsel for the petitioners relied upon the decision in *Public Prosecutor* v. *Rajagopala*[1]. That was a case where the accused was prosecuted for an offence under section 14 (*c*) Madras Entertainments Tax Act, 1939, and the Public Prosecutor filed a memo for staying of trial under section 249 on the ground that a fresh charge-sheet would be filed against the accused and two others. The case was stayed and a fresh complaint was filed against the accused and his two partners. Somasundaram, J., held that the case was instituted on a complaint and the result of the memo filed by the Public Prosecutor would amount to a withdrawal of the complaint under section 494 and the only order that could be passed was acquittal and that the trial of the accused along with others would be barred by section 403, Criminal Procedure Code.

It is clear in that case that the memo filed by the Public Prosecutor that he would file a fresh charge-sheet would show that he was not pressing the case instituted on the original complaint. That will certainly amount to an implied withdrawal. At the request of the learned Counsel for the petitioners, I directed the learned Magistrate to produce all the records concerned in the case to find out whether there was any endorsement by the Public Prosecutor for stopping the proceedings under section 249, Criminal Procedure Code. I find from the records that the proceedings were stopped on the initiation of the Magistrate himself as he found that the petitioners were absconding for a long time and that he could not proceed with the cases.

In the circumstances mentioned above, the learned Sub-Magistrate is directed to proceed with these cases expeditiously and dispose of them according to law. The petitions are dismissed.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE P. CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE M. NATESAN.

R. P. David and another .. *Petitioners**

v.

N. Daniel (died) and others .. *Respondents*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 14 (1) (b)—*Landlord requiring building for demolition and reconstruction*—Bona fide *desire or intention essential*—*No requirement building is to be old and decrepit.*

The petitioners purchased two properties and applied to the Corporation of Madras for sanction of the lay-out plan for the construction of new buildings after demolition. But the Corporation replied that the sanction would be accorded only after the existing buildings were demolished. One of the buildings had been largely demolished and in respect of the other that was in the possession of a tenant an application under section 14 (1) (*b*) of the Act was made to the Rent Controller. The

1. (1958) 2 M.L.J. 549 : 1958 M.L.J. (Crl.) 865 : A.I.R. 1959 Mad. 356.

*C.R.P. Nos. 903 and 904 of 1964. 22nd July, 1965.

Rent Controller allowed the application but in appeal the Appellate Authority, reversing the order of the Rent Controller held that the application was not *bona fide* as the landlords had not averred that the buildings were old and required for demolition and reconstruction and that they had not decided what kind of buildings they are going to reconstruct after demolition On a revision petition filed by the landlords

Held, the application filed by the landlords under section 14 (1) (*b*) of the Act has to be allowed.

The only requirement of section 14 (1) (*b*) is the honest desire of the landlord to demolish the building and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished There is nothing in the language of this clause to warrant the view that the building should be old and decrepit The expression '*bona fide*' occurring in that clause cannot sustain the opinion that it is only when a building is old and in a dilapidated condition that it could be demolished for the purpose of putting up a new construction so as to attract clause (*b*) of section 14 (1) The import of the section is that the desire or the intention to demolish and rebuild should be honestly entertained by the landlord It should not be a device to evict the tenant

Moreover there are sufficient safeguards in the statute itself against such devices in the shape of section 14 (2) (*b*), section 16 and section 33 (3) (*b*)

The fact that the landlords have not decided as to what use they should put part of the building after its reconstruction is not decisive on the question of *bona fide*

Petitions under section 25 of Act XVIII of 1960 praying the High Court to revise the order of the Court of Small Cause, Madras, dated 12th September, 1963, and made in H R. A Nos 122 and 123 of 1963 (H R C Nos 3096 and 3095 of 1962 Additional Rent Controller, Madras)

V. C Veeraraghavan and *C Harikrishnan*, for Petitioners

V K Thiruvenkatachari and *J S Vedamanickam*, for Respondents.

The Judgment of the Court was delivered by

Chandra Reddy, C J—In the revision cases filed by the aggrieved landlords against the judgment of the Court of Small Causes at Madras in H R A Nos 122 and 123 of 1963 the controversy centres around section 14 of the Madras Buildings (Lease and Rent Control) Act and the Rules The petitioners purchased the ground and premises Nos. 111 and 112, Kodambakkam High Road, Madras on 16th February, 1961, from the former owner for a sum of about three lakhs of rupees. Thereafter they required by a notice the tenants in occupation of the building standing on the land, including the respondent, to deliver vacant possession of the premises in their occupation for the reasons mentioned therein the chief of it being that they were required for demolition and rebuilding As they did not succeed in obtaining vacant possession of the same they initiated the proceedings giving rise to these appeals before the House Rent Controller, Madras

It was *inter alia* stated in the petition that after purchase the petitioners applied to the Corporation of Madras for sanction of the lay out plan for premises Nos 111 and 112, Kodambakkam High Road, preliminary to the construction of new buildings But the Corporation had written to say that the plan would be sanctioned only after the existing buildings were demolished It was in such a situation, with the idea of demolishing the buildings for reconstruction, that the petitioner called upon the respondent by their notice dated 14th August, 1961, to vacate the premises.

The petitions were opposed on the objection that the rent for the buildings in question being in excess of Rs. 250 it was beyond the jurisdiction of the Rent Controller to entertain the petitions, and that in any event as the allegation regarding demolition and reconstruction having been put forward for the first time in the present petition it was not *bona fide*. This opposition of the respondent did not prevail with the Rent Controller. On the materials before him he came to the conclusion that there were two tenancies for Rs 250 and Rs 100 respectively and as such it did not fall within the ambit of section 30 of the Act and that being so, the jurisdiction of the Rent Controller was not ousted in this behalf, and that the building was *bona fide* required by the landlord for demolition and reconstruction.

Against that judgment the tenant carried an appeal to the Court of Small Causes, Madras. The Appellate Authority while agreeing with the conclusion of the Rent Controller, that the rent paid for each of the tenancies did not exceed Rs. 250

came to the conclusion that the matter fell within the jurisdiction of the Rent Controller However, he reversed the decision of the Rent Controller in the view that in the petition for eviction the landlords had not averred that the buildings were old and required for demolition and reconstruction and that further they had not fully decided as to whether they should construct a cinema theated or a hotel on the site of the present building and that a part of the new building may be used for residence Says the learned Judge

" It is improbable that the respondents without even finally deciding about the nature of the construction to be put up by them on the site of the present building whether a cinema theatre or a hotel would require the building for demolition "

Consequently he found that the respondent's request was not true and *bona fide*.

In these revision petitions filed by the landlord this opinion of the Appellate Authority is impugned by Sri Tiruvengadachari. It is urged by learned Counsel that as the buildings were required for demolition and reconstruction it was not necessary to prove that they were old and decrepit and as such have to be pulled down. All that was necessary to make out was, that the landlords genuinely required the buildings for demolition and reconstruction He also assailed the view of the learned Judge as to *bona fides* on the ground that it is opposed to the evidence on record and also unsustainable in law.

Before we deal with the merits of these contentions it is useful to read section 14 of the Madras Buildings (Lease and Rent Control) Act, hereinafter called the Act, the correct interpretation of which furnishes an answer to the questions raised in these revision cases That section, omitting the unnecessary portions, reads thus

" 14 *Recovery of possession by landlord fot repairs or for reconstuction.*—(1) Notwithstanding anything contained in this Act, but subject to the provisions of sections 12 and 13, on an application made by a landlord, the Controller shall, if he is satisfied—

(*a*) that the building is *bona fide* required by the landlord for carrying out repairs which cannot carried out without the building being vacated , or

(*b*) that the building is *bona fide* required by the landlord for the immediate purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date

(2) No order directing the tenant to deliver possession of the building under this section shall be passed —

(*a*) On the ground specified in clause (*a*) of sub-section (1) unless the landlord gives an undertaking that the building shall, on completion of the repairs be offered to the tenant, who delivered possession in pursuance of an order under sub-section (1) for his re-occupation before the expiry of three months from the date of recovery of possession by the landlord, or before the expiry of such further period as the Controller may, for reasons to be recorded in writing, allow , or

(*b*) On the ground specified in clause (*b*) of such section (1) unless the landlord gives an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by him not later than one month and shall be completed before the expiry of three months from the date he recovers possession of the entire building or before the expiry of such further period as the Controller may, for reasons to be recorded in writing allow "

We are concerned here mainly with section 14 (1) (*b*) of the Act. It is manifest that the only requirement of section 14 (1) (*b*) is the honest desire of the landlord to demolish the building and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished There is nothing in the language of this clause to warrant the view that the building should be old and decrepit. The expression '*bona fide*' occurring in that clause cannot sustain the opinion that it is only when a building is old and in a dilapidated condition that it could be demolished for the purpose of putting up a new construction so as to attract clause (*b*) of section 14 (1) The import of that section is that the desire or the intention to demolish and rebuild should be honestly entertained by the landlord It should not be a device to evict the tenant Moreover there are sufficient safeguards in the statute itself against such devices in the shape of section 14 (2) (*b*), section 16 and section 33 (3) (*b*). Under section 14 (2) (*b*) to which

we have already referred, an undertaking has to be given by the landlord that the work of demolishing any material portion of the building would be substantially commenced by him not later than one month and that any violation of this undertaking will visit the landlord with the penal consequences contemplated by section 33 (3) (*b*), *viz*, conviction and a punishment with a fine extending to one thousand rupees. Additionally section 16 of the Act enables the tenant to occupy the building after giving notice of his intention in that behalf, if the landlord fails to commence the work of demolition within the period of one month In this situation it is difficult to agree with the conclusion of the learned City Civil Judge that the landlord has also to prove that the building was too old and decrepit. In our opinion that requisite is not contemplated by clause (*b*) of section 14 (1) of the Act.

There is abundant authority for this view of ours In *Neta Ram* v *Jiwan Lal*[1] it was ruled that in order to obtain an order for ejectment of his tenant on the ground of its being required for reconstruction the landlord has only to satisfy the Rent Controller about the genuineness of his claim and that this could be established by looking at all the surrounding circumstances such as the condition of the building, its situation, the possibility of its being put to more profitable use after re-construction, the means of the landlord and so on In the course of the judgment it was observed by Hidayatullah, J, who spoke for the Court, that in deciding whether the building is required by the landlord for reconstruction, or for its replacement by another building or for erection of other buildings, the Court must have regard to the *bona fides* of the request of the landlord, which meant that the desire to rebuild the premises should be honestly held by the landlord, but that the condition of the building also played an important part in determining whether the landlord had the intention genuinely and was not using this excuse as a device to get rid of the tenant.

Thus it is not essential to establish that the building is in a very old and dilapidated condition. This is so, also appears from several judgments of single judges of this Court

This matter was elaborately dealt with by Ramamurti, J, in *Mahboob Badsha* v *Manga Devi*[2], and by Venkatadri, J., in *Chandrasekara Chetty* v *Kakumani Adikasavalu Chetty's Charities*[3] The learned Judges after referring to the decided cases and after reviewing the case-law on the subject, held that it was the genuineness, of the desire to demolish and rebuild that was relevant and that it was not essential to prove that the building was very old The two judgments of Anantanarayanan, J, in *Mahsin Bhai* v *Hale & Co, Madras*[4], and *Sha Manakchand* v *Sankarji Moolchand*[5] are not helpful to the petitioners, as the learned Judge has not laid as a universal proposition of law that the age of the building is the determining factor in relation to the application under section 14 (1) (*b*) of the Act

The dictum in *Bhulan Singh* v *Gnanendra Kumar*[6] also strengthens our view. Construing an analogous provision in the West Bengal Premises Rent Control (Temporary Provisions) Act of 1948 which lays down

"Nothing in this sub-section shall apply where the premises are *bona fide* required by the landlord either for purposes of building or rebuilding, or for his own occupation or for the occupation of any person for whose benefit the premises are held"

Harries, C J, delivering the judgment of the Bench, observed :

"It was suggested that this provision giving the landlord a right to possession, if he established that he required the premises *bona fide* for rebuilding could have no application whatsoever unless the state of the premises was such that they required to be rebuilt It is to be observed that proviso (*j*) to section 11 (1) of the Act does not mention premises requiring rebuilding What it states is that sub-section (1) shall have no application if the landlord requires the premises *bona fide* for rebuilding. The state of the premises therefore is not an essential factor in the case However, it cannot be overlooked that in this case the learned Judge has accepted the evidence of a witness which showed that these premises were very old, dilapidated, dangerous and likely to fall if extensive repairs were not done to them quickly"

1. (1962) 2 S C J 270. A I R 1963 S C 499
2. (1965) 2 M L J 209
3. A I R 1966 Mad. 14.
4. (1964) 77 L W 194
5. (1965) 2 M L J 12
6. A I R 1950 Cal 74.

Thus having regard to the language of the relevant statutory provisions and the decided cases the conclusion is irresistible that it is not necessary for the landlord to prove that the building was very old and unfit for occupation to succeed in obtaining orders under section 14 (1) (*b*).

There remains the question relating to the *bona fides* of the petitioners In this context it should be remembered that the first petitioner categorically stated in his evidence that he bought the building with land, for demolition and reconstruction and that he applied to the Corporation for sanction of the layout for the premises shortly after he purchased the property But the Corporation wanted him to submit the plan after completion of the demolition He also filed a copy of the plan that was sent to the Corporation. This evidence of his stood uncontradicted. The respondent has not stated anything to the contrary In fact he admitted that building No. 111 has been largely demolished which substantiates the statement of the petitioners that they needed this building for demolition and reconstruction. Further, it is not suggested that the petitioner is not possessed of sufficient means to carry out the demolition and the reconstruction operations Indisputably the petitioners purchased this property for about three lakhs of rupees and they are well-to-do men, having the where-with-all to demolish and put up new building. The fact that the landlords have not decided as to what use they should put a part of the building after its reconstruction is not decisive From that one thing alone it cannot be inferred that the petitioners had not made up their minds as to whether the building should be demolished and a new construction put up in its place The finding of the Judge of the Court of Small Causes at Madras arrived at without any reference to the evidence on record and the admission of the respondent cannot be sustained. The Rent Controller after careful consideration of the material before him reached a decision that it was required for demolition and reconstruction and there was no material on the basis of which that finding could be disturbed. As we have already said, the Judge of the Court of Small Causes gave the finding without any regard to the material on record and without appreciating the scope and ambit of sub-section 14 (1) (*b*) of the Act. In these circumstances, the decision of the appellate authority is unsustainable and has to be set aside and that of the Rent Controller restored.

The respondent requests us to grant him some time to vacate and deliver vacant possession of the premises and to be permitted to remove the structures put up by him The petitioners are willing to give him nine months from 1st August, 1965, that is, till 30th April, 1966 They have also no objection to the respondent removing the structures put up by him, but within that time Ordered accordingly.

The Civil Revision Petitions are allowed with costs throughout in one.

V.S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

Gomathi Ammal and six others .. *Appellants**

v.

Ramachandran Pillai and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 110-*A*—*Motor Accident Claims Tribunal*—*Claim for compensation for death*—*Quantum of*—*Expectation of life*—*Computation of.*

Tort—*Damages for loss of expectation of life*—*How computed in case of persons in independent professions.*

It is now a well accepted proposition that due to heavy taxation and increasing cost of living few people are able to save or make any provision for their family. Hence many people tend to con-

* A.A O. No. 231 of 1964. 28th March, 1966.

tinue to work now a good deal longer than they did before There is nothing unusual therefore to presume that professional men go on working until they are 70 or even more Further in fixing the damages in terms of money the permanent variations in the value of the rupee should also be taken into consideration That the deceased has left substantial properties to his legal representatives is not a relevant consideration in assessing the damages due to the premature death of the victim of the accident

In the case of a lawyer aged 53 years a sum of Rs. 20,000 will be a reasonable compensation taking his prospect of life as 70 years and his earning capacity at Rs. 300 per mensem

Appeal against the order of the Motor Accidents Claims Tribunal (District Judge), Tiruchirappalli dated 26th December, 1963 and made in M.A.C.T.O.P, No 27 of 1962

N Sivamani and *M V Krishnan*, for Appellants.

K. C Jacob, *S K. L Ratan* and *X Cardoze*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the widow, sons and daughters of N S Seshadri Sarma, against an order of compensation awarded to them, in a sum of Rs 3,600 for causing the death of Seshadri Sarma by the first respondent whose motor cycle was insured with the second respondent, the Oriental Fire and General Insurance Company, Limited. Not satisfied with the amount of compensation, the legal representative of Seshadri Sarma have filed the present appeal for the enhancement of compensation

The Motor Accidents Claims Tribunal, Tiruchirappalli (District Judge) found that the accident happened only because of the rash and negligent act on the part of the first respondent, the owner of the motor cycle He also found that the compensation amount which he fixed at Rs. 3,600, was payable by the second respondent-insurance company.

At the time of the accident, the deceased was aged 63. He was practising as an Advocate in Tiruchirappalli, specializing in the work conected with trade-marks. On the materials placed before the Tribunal, it was found that the deceased would have been earning about Rs 300 per mensem He was maintaining two establishments, one at Coimbatore where his wife and younger children were residing, and the other at Tiruchirappalli where he was carrying on his professional activity. The deceased has left a residential house at Coimbatore worth about Rs 50,000. The Tribunal fixed a sum of Rs 150 per month as the probable amount required for the maintenance of the deceased's family The Tribunal calculated the expectation of life of the deceased as two more years as he had already reached 63 at the time of his death. On that basis, the Tribunal awarded compensation in a sum of Rs 3,600 In this appeal, the widow and children have questioned the legality of estimating or appraising or computing the amount of compensation arrived at by the Tribunal.

Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*[1] said .

" There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment "

The question of assessing compensation becomes often a complicated and difficult task, especially when the deceased happens to be a professional man like the deceased in this case. The Courts have, in recent cases, recognised that, under the present conditions, most professional men continue to work till the age of 70 or more Lord Goddard, in *Zinaviaff* v *British Transport Commission* (vide page 81 of The Quantum of Damages by Kemp, Vol 2), while considering the quantum of damages to be awarded to the deceased who was aged 46 at the time of the accident and who was a Consulting Engineer and a partner in a well-known firm and whose professional income in the year before his death was £ 4,750 and his contribution to his family

1. L.R. (1942) A.C. 601 at 617.

was £ 2,300 a year, was asked to assume that the working life of the deceased would end at the age of 60 In this connection Lord Goddard, C J said.

" Amongst other things which one has to remember is that owing to the incidence of heavy taxation, few people are fortunate enough in these days to be able to save or to make any provision for their family, and the only way in which a professional man can go on providing for his wife and himself and any members of the family who may be dependent upon him is to continue to work , consequently, I think many people tend to continue to work now a good deal longer than they did before A man cannot rely upon his savings nowadays because he finds it impossible to save , and in any case, using one's common every day experience, one knows that it is nothing unusual for a man to go on working until he is 70, or, indeed, rather longer "

Finally, the Noble Lord assessed the damages in a round sum of £33,000.

A Division Bench of this Court in *Indian Mutual General Insurance* v *Kethandian*[1], while considering the quantum of compensation to be awarded to the plaintiff who was aged 52, when he lost his son aged 18, held that the father would be entitled to compensation on the basis that he would live till his 70th year In *D Balakrishna* v *Sadasivaraju*[2], a Division Bench of Mysore High Court held that the three years rule adopted by the District Judge was utterly inadequate and that he should also have capitalised the pension In the instant case, I am of the opinion that the assessing of the amount of compensation on the basis that the deceased would have lived only for two years more does not appear to be correct. It is true that it is very difficult to assess and calculate the compensation to be awarded to the legal representatives of the deceased Viscount Simon has stated the general principles that should govern in the calculation of the pecuniary loss to the dependants of the deceased, in *Nance* v *British Columbia Electric Railway Co , Ltd* [3] These principles have been restated by their Lordships of the Supreme Court in *Gobald Motor Service* v *Veluswami*[4] thus :

" at first the deceased man's expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accidents ; secondly, the amount required for the future provision of the wife shall be estimated having regard to the amounts he used to spend on her during his lifetime, and other circumstances , thirdly, the estimated annual sum is multiplied by the number of years of the man's estimated span of life, and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death Therefore, the actual extent of the pecuniary loss to the respondents may depend upon date which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture "

In the instant case, the deceased, who was a professional man earning more than Rs 300 at the time of the accident, would have lived and carried on his professional activities for more than ten years He had a big family He had two daughters to be married Except for the residential house in Coimbatore, he had not left behind any property worth the name Naturally, he would have had to work hard and continue to do work, in order to provide for his wife, for himself and the other members of the family dependent upon him The deceased came from a respectable middle class family His father retired as a Deputy Collector. His brother-in-law is a retired D M O The point is whether the ancestral house in Coimbatore should be taken into consideration, while assessing the compensation to be awarded to the legal representatives of the injured man. In *General Trunk Railway of Canada* v *Jennings*[5], the Privy Council held that where a deceased person had left sums of money in some form or other—substantial sums of money which went to the widow they had to be taken into consideration, in deciding the widow's pecuniary loss, what was described as the acceleration of the payment to herself of what her husband left her as the result of his premature death But this view was not approved in later cases *e g* , *Banchead* v *Railway Executive*[6], where it was observed that it was a grisly way of looking at things to say that a widow benefited from her husband's premature death because she received what he proposed to leave her Therefore the fact that he had left a substantial house worth Rs. 50,000 should not be taken into consideration, while assessing the quantum of compensation

1 (1966) 1 M L J 113
2. A I R. 1960 Mys 106
3 L R. (1951) A.C. 601.
4 A I R 1962 S C 1, 5
5. L R. 13 A C 800.
6 (1949) 65 T.L.R. 435.

to be awarded It is in evidence that the deceased was a bronchitis patient and that he was coughing for several years But there is no reason why he should not live for many more years In fact the brother-in-law of the deceased, himself a retired D M O has not been cross-examined on the point whether a bronchitis patient would not live long In the absence of any evidence to the *contra*, and taking a comprehensive view of the facts of the case, it seems to me that it is just and reasonable to award compensation in a sum of Rs 20,000 calculated on the basis that a person like the deceased would live for more than 70 years The principles on which an appellate Court would interfere with an award of damages made by a Judge are perhaps best stated in a well-known passage in *Flint* v. *Lovell* [1] :

> " In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court an entirely erroneous estimate of the damage to which the plaintiff is entitled "

In this case, the sum of Rs 3,600 awarded as compensation appears to be too low, for a man of the status of the deceased having a large family dependent upon him for their living, and also where, under the present conditions, most professional men like the deceased continue to work till the age of 70 and more. Further, one has also to take into account the real value of money, the purchasing power of money In *Sands* v *Devan*[2], Lord Norman said .

> " Since we must perforce measure the damage in money, we must, I think, take account of large and relatively permanent variations in the value of money."

In the same case, Lord Honcrieff said :

> " As regards what falls to be paid in money, the Court must take note of the changes in the value of money "

The rupee-value has gone down considerably Thus, taking into account that the deceased was an Advocate earning more than Rs. 300, that he came from a respectable middle class family, that he had to provide for a big family, that still a son has to be educated and two daughters to be got married, I think the sum of Rs 20,000 awarded to the appellants would be neither too high nor too low.

Lastly, we come to the question of apportionment of the amount of compensation The first two sons of the deceased N S Ramamurthy and N S Krishnamurthy are well-settled in life the first is a Technical Information Officer in Bhilai and the second is an Assistant in the Government of India, New Delhi. In their case, there is no dependency which warrants their having anything The last son is a student The daughters are still to be married In the circumstances, the sum of Rs 20,000 would be allocated as follows : Rs 5,000 for each of the two daughters as their marriage provision, and Rs 10,000 for the wife of the deceased and his last son N S Balasubramaniar, till he gets an employment for their maintenance. The compensation amount is payable by the Insurance Company

In the result, the appeal is allowed ; but there will be no order as to costs.

R M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T VENKATADRI

Tiruvenkada Moopanar and another .. *Appellants**

v

Subbiah Moopanar .. *Respondent.*

Contract Act (IX of 1872), section 27—Contract in restraint of trade—What amounts to—Scope of prohibition under

Though as a general rule an agreement in unreasonable restraint of trade is illegal and void as being contrary to public policy, it is also the policy of the law to hold persons bound by their contracts. Hence unless it is shown that the restraint is manifestly injurious to public welfare, a contract in reasonable restraint of trade is valid If the Court is satisfied that the restraint is reasonably necessary

1 L R (1935) 1 K B 354 at 360. 2. (1945) S.C. 381

* S.A. No. 805 of 1962. 8th April, 1966.

to protect the interests of the contracting parties and was not inimical to the interests of the public, it will treat it as valid The test is whether the primary object of the parties was in restraint of trade or was one to have a restrictive covenant in a sale The reasonableness of the restriction must be judged by the character and the nature of the business or its customers For example, an agreement by a person not to sell a particular kind of his goods to any one else except the plaintiff, generally or within a specified territory, *e g*, exclusive agency of certain goods or an agreement to sell certain goods only to a specified party for a stipulated period, have all been held to be valid

An agreement by a grower of betel vine to sell the betel leaves grown by him in a particular village only to the plaintiff and to none else is not one in restraint of trade within the prohibition of section 27 of the Contract Act.

Appeal against the Decree of the District Judge, Tirunelveli in Appeal Suit No. 134 of 1961, preferred against the Decree of the Court of the District Munsif of Tenkasi in Original Suit No. 257 of 1959

N Sivamani and *S V. Venugopalachari*, for Appellants

M. V Krishnan, for Respondent

The Court delivered the following

JUDGMENT.—This Second Appeal arises out of a suit instituted by the respondent for an injunction restraining the appellants from supplying and selling the betel leaves grown by them in the revenue village of Kadayanallur to any one except the respondent till 31st May, 1960 and for directing the appellants to pay the respondent Rs 500 as damages caused by withholding the supply of betel leaves to the respondents till the date of the plaint.

The respondent's case is that the parties belong to Senayar community whose caste profession is cultivation of betel leaves. It was the custom and usage among the members of the Senayar community to entrust all the betel leaves grown in the village to a particular person and not to sell themselves to any other individual. These betel leaves used to be put in auction among the members of the community and the amount fetched at the auction was treated as common fund and utilised for the common benefit of the members of the Community. And the highest bidder at the auction was entitled to receive all the betel leaves from the members of the Community and no member had a right to sell the betel leaves to any one outside the village In accordance with this custom and usage, in the year 1959 this right to receive the supply of betel leaves and sell the same was put in public auction by one Veerabadra Mooppanar, a prominent member of the Community, in the premises of the Bajana Matam, and the respondent was declared to be the highest bidder for a sum of Rs. 645 Thereupon the respondent paid one-fourth of the amount and obtained a receipt, and also paid the balance of amount in a month's time. According to the respondent, the appellants, quite contrary to the established usage and custom, began to sell their betel leaves to one Paramasiva Mooppanar, and also began to purchase betel leaves from the neighbouring villages and sell them in the village of Kadayanallur. The respondent was put to loss and he gave notice to the appellants and finally filed the suit aforesaid.

The suit is resisted by the appellants that such a condition directing them to sell the leaves to a particular person is a restraint of trade and against public policy and the provisions of the Indian Contract Act The custom pleaded by the respondent is illegal and unreasonable and not binding on them and that it also offends Article 19 of the Constitution The appellants are not aware of any kind of lease to the respondent as alleged by him in his plaint They have not taken part in the auction held by Veerabadran Mooppanar, but even assuming that there was such an auction, it is not valid and binding on them.

On these pleadings the parties went to trial The important points to be considered by the trial Court were whether the condition imposed at the auction that all the members of the Senayar Community should sell their betel leaves to the highest bidder in the auction was valid and whether the custom pleaded in the plaint was true and valid.

Evidence has been adduced, oral and documentary. Both the Courts below have held that the respondent has not proved the existence of such a caste custom

but only the existence of an implied contract by the members of the Senayar Community in regard to the sale of the betel leaves for the time being. They have also held that the selling of the betel leaves to the highest bidder in the auction is not a restraint of trade within the meaning of section 27 of the Indian Contract Act. It has been found that the appellants themselves participated in the auction held in the concerned year and they are bound by it. Finally, holding that the respondent is not entitled to any injunction, the Courts below have awarded damages in a sum of Rs. 56-25. The defendants have preferred the Second Appeal.

The question of law to be considered in this case is whether there is any restraint of trade. The Court below has relied on *Mackenzie* v *Sri Ramiah*[1], and *Sadagopa Ramanjiah* v. *Mackenzie*[2], where there was a contract that the salt manufactured by the defendant should be sold to the plaintiff's firm for a fixed price, and it was held that the such a clause was not invalid. The Court below relying on these decisions has held that there was no restraint of trade. But learned Counsel for the appellant has contended before me that such a clause is a restraint on trade, and to support the stand taken by him, he has cited *Sheik Kallu* v. *Ramsaran Bhagat*[3]. In that case, a merchant entered into a contract with a manufacturer of combs that he should sell the combs to him only and not to anybody else, in order to enable him to supply the same to the traders in Calcutta and that if there was to be a breach of the contract then the manufacturer should pay Rs. 100 as damages. The manufacturer subsequently refused to supply combs to this merchant and sold the goods to another person. In a suit for damages by the merchant, the manufacturer contended that such an agreement was an unlawful restraint of trade. A Division Bench of the Calcutta High Court held that the agreement being in restraint of trade was void and unenforceable.

As a general rule an agreement in unreasonable restraint of trade is illegal and void, as being contrary to public policy, but it must be shown that it is manifestly injurious to the public welfare, since it is also the policy of the laws to hold persons to their contracts. A contract in reasonable restraint of trade is valid. The law in regard to the restraint of trade, is, in India, codified. Therefore, a contract, to be a valid agreement in India must neither be opposed to public policy nor amount to restraint of trade within the meaning of the section. But at the same time a contract which is in restraint of trade may be reasonable between the parties and consistent with the interests of the public. To arrive at a proper decision with a view to determine whether the primary object of the parties is in the sale or in the restrictive covenant or whether the case is one of restrictive covenant in the sale, if so, is the restriction having regard to all the facts and circumstances, reasonable? The test of the validity of a contract in restraint of trade is its reasonableness. In Sanjiva Row's Indian Contract Act (5th edition), Volume 1, page 516, the learned editor has deduced the following tests from an analysis of the judgment in *Nordenfelt* v. *Maxim Nordenfelt Guns Co.*[4]:

"(1) The generality of the covenant, whether as to time or space, may render it unreasonable; that is, a covenant is not necessarily valid because restricted as to time, but may be void because it is not so restricted.

(2) Different degrees of protection are reasonable in different cases.

(3) The reasonableness of the restriction must be judged by the character and the nature of the business or of its customers."

From decided cases, the learned Editor has deducted that an agreement by the seller of the goods with a purchaser not to sell certain kinds of goods to anyone else in the same town, a contract to sell a brand of cigars to no one in the city but the defendant so as to give him the exclusive agency for such sale, an agreement between two traders that the first will sell the other all his commodities and that the second will buy from the first alone, an agreement that the defendant shall for a certain number of years consign exclusively to the plaintiff all the blankets of his manufacture, an agree-

1. I L R 13 Mad 472.
2. I.L.R. 15 Mad. 79.
3. 13 C W N 388
4. L R (1894) A.C 535.

ment by a dentist to purchase artificial teeth of a manufacturer on condition that the latter will not sell such teeth to any person in the town where the dentist resides, an agreement by a manufacturer to prepare for his purchaser a certain number of barrels of lime within a given time at a certain price and not to sell to any other persons any lime during the continuance of the agreement, and an agreement not to sell a certain medical preparation to anyone but the plaintiff within a definite territory have all been sustained by the Courts. Therefore if the Court is satisfied that the restraint is reasonably necessary to protect the interests of the merchants and was not inimical to the interests of the public, then it will treat it as valid It is very dangerous to apply the principle of public policy for each and every contract, because, as Mr Justice Burrough says in *Richardson* v *Mellish*[1], that public policy is a very unruly hose, and when you once get astride it you never know where it will carry you and that public policy does not admit of definition and is not easily explained While speaking on Public Policy, Sir David Hughes Parry is his Hamlyn Lectures (Tenth series) on the Sanctity of Contracts in English Law, observes at page 59 .

" Another criticism of it (public policy) is that it must inevitably be a variable quantity-influenced by the judge's training outlook and philosophy varying with the prevailing fashions in moral, economic or social principles, or even with changing economic or social practices As Lord Wright observed in *Fender* v *Mildmay*[2], 'certain rules of public policy have to be moulded to suit new conditions of a changing world'."

In the instant case, it is not possible for me to say that it is a restraint of trade which can be brought within the mischief of section 27 of the Indian Contract Act. If we analyse in this case, the appellants themselves have participated in the auction which was held in the concerned year and were also signatories of the bidders' list Thus, the appellants were a consenting party in regard to the supply sand sale by the respondent of the betel leaves grown by them This form of contract cannot be said to be any restraint of trade. It is unnecessary for me to consider whether the custom alleged by the respondent is valid or not. The Courts below have come to the correct conclusion that the respondent is entitled to damages, for breach of the conditions of the contract by the appellants.

For the foregoing reasons, I dismiss the Second Appeal But there will be no order as to costs. No leave.

R.M. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

The Workmen of Tinnevelly Tuticorin Electric Supply Co., Ltd , represented by the Tinnevelly Tuticorin Electric Supply Co., Ltd., Employees' Union, Tinnevelly (Tirunelveli) .. *Petitioner**

v

The Industrial Tribunal, Madras, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Bonus —Claim for—Basis of determining quantum of bonus—Deduction of ' prior charges '—Depreciation of machinery working on multiple shifts —Allowance for reserves used as working capital and rehabilitation charges—Mode of computation

The basis of justifying the payment of bonus in any industry is that both capital and labour contribute to the earnings of the concern and it is therefore fair that labour should derive some benefit if there is surplus after meeting prior or necessary charges The formula evolved by the Labour Appellate Tribunal and explained by the decisions of Courts to determine the available surplus is that certain prior charges such as provision for depreciation, rehabilitation, return on paid-up capital, return on working capital, payment of income-tax, etc , should be deducted from the gross profits The formula has been found to be working satisfactorily and though its application in particular cases may be flexible, it should be adhered to and it is not desirable to make additions to the list of prior charges recognised by the formula

1. (1824) 2 Bing 229 at 252. 2. L R. (1938) A C 1

*. W.P.No. 657 of 1963. 8th April, 1966.

Before any deduction could be claimed as a prior charge, it could be only on the income of the employer A rebate given to the consumer under a statutory duty in respect of certain excess collections, is one which should be deleted even before the conputation of the gross profits and hence it is a misnomer to call such amounts as a prior charge as contemplated by the formula evolved by the Labour Appellate Tribunal They do not form part of the profits of the employer and has to be ignored The labour cannot ask for adding back such amounts to arrive at the surplus for computation of bonus

In cases of machinery working round the clock the management is entitled to claim a higher depreciation allowance than incases of ordinary machinery In case of electricity undertakings, in respect of transformers, cables, overhead transmission lines, *etc*, which are constantly underload, a higher depreciation allowance can be claimed In determining the surplus for purposes of declaring bonus, the provision for depreciation provided under the Income-tax Law is not final The allowance for depreciation under the Income-tax Law is only on a notional scale and does not in all cases cover the true depreciation that a piece of working machinery might suffer

As regards allowance on working capital the formula envisages a return of 6% on the paid-up capital and a return of 4% on the reserves used as working capital, reserves which would otherwise belong to the company absolutely and which it utilised for the purpose of the concern It is not the entire working capital that is entitled to 4% return but only the quantum of reserves used as working capital

Claim for rehabilitation charges is in respect of a recurring and continuous process of wastage or depreciation of assets and it could not be said that what was granted as rehabilitation charges in one year should set the upper limit for such a grant for all time to come In determining the probable value of the machinery that would require replacement a certain amount of guess work is inevitable. So long as the estimated cost is not far disproportionate to the prevailing trend, it can reasonably be accepted and the multiplier based on such an estimate cannot be said to be incorrect The burden of proof in the case of a claim for rehabilitation is on the employer and unless the employer places proper and acceptable evidence to arrive at a proper multiplier for arriving at the depreciation allowance, the claim has to be rejected

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the first respondent the Industrial Tribunal, Madras, in Award in I D. No 46 of 1962 published in the Fort St. George Gazette, dated 30th January, 1963, and quash the order made therein

N. G R. Prasad, for Petitioner.

M. R Narayanaswamy, for 2nd Respondent.

The Court made the following

ORDER —*W.P. No.* 657 *of* 1963 :—A dispute between the workmen and the management of the Tinnevelly Tuticorin Electric Supply, referred to the Industrial Tribunal for adjudication, related to the payment of additional bonus for the year 1960-61 The company had already granted three months' bonus, but the Union on behalf of the workers claimed that the surplus available from out of the trading profits of the relevant year would justify the grant of six months' bonus The management was asked to file a statement showing the calculation of the profit according to the Full Bench formula. Before the Tribunal, the Union objected to the debit of certain items. Among them was rebate to consumers, which according to the Union, should not have been deducted from the gross profits as a prior charge. Another objection was that having regard to the nature of the industry, since the company was only distributing electric power, there could not be depreciation of the static machinery such as overhead lines, underground cables and transformers and no allowance of multiple shift depreciation should be given It was next contended that in providing for the return on reserves used as working capital, it should be proved by the management that the amount in respect of which the return was claimed was actually used in the undertaking, and that merely by the calculation of the difference between the assets and liabilities, it could not be assumed that reserves, respectively the difference had been used as working capital. It was also urged that there was no proof relevant to the working out of the rehabilitation charges On all of these points, the Industrial Tribunal upheld the contention of the management. It held that the profit available would not justify the grant of any additional bonus.

The Union has approached this Court with an application under Article 226. The contentions advanced are that in dealing with the questions in dispute, the Industrial Tribunal has committed errors of law and that the award has for that reason to be quashed

I shall deal with the points raised seriatim.

It will be useful to start with the formula evolved by the Labour Appellate Tribunal. It is reported in *Millowners' Association, Bombay* v. *Rashtriya Mill Mazdoor Sangh, Bombay*[1]. This was the first occasion when the Labour Appellate Tribunal formulated certain definite principles for the purpose of determining questions relating to bonus. Proceeding on the view that bonus is cash payment made to the employees in addition to wages and that it could no longer be regarded as an *ex gratia* payment, the Appellate Tribunal repelled the contention that a claim to bonus is not admissible where wages have been standardised. The basis justifying the payment of bonus is that both capital and labour contribute to the earnings of the industrial concern and it is therefore fair that labour should derive some benefit if there is surplus after meeting prior or necessary charges The principles stated are as hereunder. First of all, the gross profits have to be arrived at after meeting the wages and dearness allowances to the employees and other items of expenditure. As an investment has to be made in the industrial undertaking and in order to ensure a return, the plant and machinery should be kept in good working order, such maintenance is also to the advantage of the labour. The first charge on the gross profits should be the amount of money that would be necessary for rehabilitation, replacement and modernisation of the machinery. The Appellate Tribunal stated that since the depreciation allowed by the Income-tax law would not be sufficient for these purposes, an extra amount would have to be annually set apart as reserves to make up the deficit. Next, it was laid down that the paid-up capital is entitled to a fair return The third point was whether any additional return on the reserves employed as working capital should be granted. The Appellate Tribunal observed that the reserves carried over from year to year in law belong to the company and the company is entitled to some return on that money employed as working capital. The company is entitled to deal with the reserve as it chooses and neither the shareholders individually nor the employees can as of right claim any direct benefit accruing out of the reserves employed as working capital. The employment of reserves as working capital obviates the necessity of borrowing money from outside sources the interest payment on which would cut out the profit. It was held that while the return on the paid-up capital should be 6 per cent. that on the reserves used as working capital should be 4 per cent. It is after these items, are provided for out of the gross profits and a surplus is available that any bonus would be payable.

The working of this formula was explained in a decision of the Supreme Court in the *Indian Hume Pipe Co.* v. *Their Workmen*[2]. Their Lordships observe that the prior or necessary charges which should be deducted from gross profits in order to arrive at the surplus should be : (1) provision for depreciation, (2) reserves for rehabilitation, (3) a return of 6 per cent. on the paid-up capital, (4) a return on the working capital at a lesser rate than on the return on the paid-up capital, and (5) an estimated amount in respect of the payment of the income-tax They observe that this Full Bench formula had been working satisfactorily throughout the country and this formula should be adhered to, though there is scope for flexibility in the working thereof in accordance with the exigencies of the situation. They explain that in any industry, there are three interests involved, namely, shareholders, the company and the workmen, and all these interests have to get their proper share in the surplus profits ascertained after due provision is made for the prior charges It may therefore be taken as well settled that the abovementioned items have to be deducted from out of the gross profits, and in general any dispute that arises in cases where bonus is demanded is whether this or that item of charge has been improperly

1. (1950) 2 L.L.J. 1247. 2. (1959) 2 L.L.J. 357.

allowed. The matter was also dealt with by the Supreme Court in *A C C. and others* v. *Their Workmen*[1]

The first item in dispute relates to rebate to consumers In the memo. of calculation of surplus profit under the Full Bench formula, the profit as per the revenue account has been taken and the amount representing provision for rebate to consumers deducted therefrom The short contention advanced by the learned Counsel is that this is not a prior charge only to the Labour Appellate Tribunal formula can at all be deducted from the gross profits. It is no doubt true that in *A C C. and others* v *Their Workmen*[1], it was pointed out that employers sometimes make an attempt to add items to lists of prior charges and that the Court had always been reluctant to vary or add to the formula evolved by the Labour Appellate Tribunal. Their Lordships of the Supreme Court deal also in this case with the employer's claim to treat the amount credited to the gratuity fund as a prior charge. While accepting the position that a gratuity fund is created for the benefit of the workmen and there should be no difficulty in recognising the employer's claim to the deduction of appropriate amounts on this account, they yet say that on principle, it is desirable that no addition should be made to the list of prior charges recognised by the formula. Again in *Indian Hume Pipe Company* v *Their Workmen*[2], their Lordships disallowed an amount credited towards the debenture redemption fund as a prior charge on the ground that the Full Bench did not envisage any such prior charge What are prior charges has been indicated in the Full Bench formula and it is principally relying upon these observations that there should be no enlargement of the items found in the Full Bench formula that the learned Counsel contends that the amount specified above should not have been deducted, as it does not form a prior charge. It is also urged that the employer has already taken these amounts as earned, that it has paid income-tax thereon and that the provision, and the payment of rebate has been accumulating year after year without being paid to the consumers, and that being so, it is said, this rebate cannot be regarded as an item which is deductible. For the employer it is contended that the sum represents amounts that are refundable to the consumers under the provisions of the Electricity Supply Act, as the charge for the supply of energy had been levied from the consumers at a higher rate than what the law prescribed It is accordingly the contention, broadly stated that the amount does not represent any part of the profit at all and that in the light of the provisions contained in the Indian Electricity Act, the management which had collected these amounts at a particular rate was only in physical custody of the moneys pending the discharge of a statutory liability to refund those amounts. On the question whether it can be regarded as a prior charge, reference has been made to *Bombay Gas Company, Ltd.* v *Their Workmen*[3] In that case, their Lordship of the Supreme Court allowed the wealth tax payable by the employer as a prior charge. They observe that at the time when the Full Bench formula was evolved there was no wealth tax and that the non-inclusion of wealth tax as an item of a prior charge in the Full Bench formula could not be a ground for refusing the deduction, for it stood on the same footing as income-tax as a prior charge.

It seems to me however that the nomenclature of prior charge cannot reasonably be given to this item in dispute This rebate to consumers is governed by the provisions of the Electricity Supply Act Schedule VI of the Electricity Supply Act, 1948, enjoins upon the supplier to adjust his rates for the sale of electricity, whether by enhancement or reducing them, so that his 'clear profit' in any year shall not, as far as possible, exceed the amount of a "reasonable return" The terms 'clear profit' and 'reasonable return' are defined in the Schedule. The Tribunal notes that the underlying idea of the VI Schedule to the Electricity Supply Act is that there should be a ceiling on the profits earned by electrical undertakings. At the end of each year, the supplier of electricity has to work out his profit and limit it to the quantum laid down in the VI Schedule, and he is called upon to refund

1. (1959) 2 L L J 357.
2. (1959) 1 L L J. 644.
3. (1961) 1 L.L.J. 508.

any excess charge that he might have collected during the year. In effect, what happens in the case of electricity supply undertakings is as below: Assume that the profit is say Rs. 1,000, but the reasonable profit as computed in terms of the Schedule is Rs. 700, under clause (ii) of Schedule VI, the undertaking can take to itself one-third of the excess, but so as not to exceed 5 per cent. of the reasonable return. In the example cited, out of Rs 300 representing the difference between the profit and the reasonable return, the undertaking can take only 5 per cent of Rs 700, *i.e.*, Rs. 35 Of the balance of Rs 265, one half has to be appropriated to the Tariffs and Dividend Control reserve and the other half has to be distributed or carried forward for distribution to the consumers in the form of a proportional rebate on the amounts collected from them for the sale of electricity and meter rentals It is such amount as Schedule VI directs the refund of to the consumer that is in dispute in the present case It does not seem to me to be a case of a deduction out of the gross profits, but a deduction as an item of lawful expenditure connoting a legal liability to pay, which should figure in the accounts before even the gross profit is arrived at; that is to say, the amount computed as refundable was never the income of the undertaking, because it was under a statutory duty to pay back that amount It is not a case of something in the nature of a prior charge which is deducted. Mr M R Narayanaswami, learned Counsel for the employer, has pointed out that in conformity with the requirements of Schedule VI, the company has reduced the rates to bring the overall profit within the margin of the reasonable return. Whether the excess amount collected was paid or only kept as a refundable reserve makes no difference in principle. In the eye of law, any amount collected over and above what would be a reasonable return is not part of the income of the licensee. It is only if it is income of the licensee that the question of regarding it as a prior charge arises

A similar question came up for consideration before the Supreme Court in Civil Appeals Nos 633 and 634 of 1964, (since reported in *The Poona Electric Supply Co., Ltd Bombay* v. *The Commissioner of Income-tax, Bombay City I, Bombay and another*)[1]. In that case, the Poona Electricity Supply Company carried on the business of distribution of electricity under a licence During certain assessment years, the company claimed deduction of two amounts from its taxable income These amounts represented the excess collection which the company had to distribute to its consumers in the form of a rebate, the excess being the excess over the amount of reasonable return under Schedule VI to the Electricity Supply Act. The question arose whether these sums were deductible in arriving at the taxable income of the assessee Their Lordships refer to the provisions of the Electricity Act, 1910, and the Electricity Supply Act, 1948 They point out that the object of the latter Act is to prevent the licensees from charging unreasonable rates to the detriment of the consumers The provisions of the VI and VII Schedules to the Act are deemed to be incorporated in the licence of every licensee. The VI Schedule imposes a duty on every licensee to so adjust his rates for the sale of electricity by periodical revision, that his clear profit in any year shall not, as far as possible, exceed the amount of reasonable return The Schedule also defines the expressions 'clear profits' and 'reasonable return.' and it further provides that if there is an excess over the amount of reasonable return, one-third of that excess shall be at the disposal of the undertaking One half of the balance of the excess shall be distributed in the form of a proportional rebate to the consumers or carried forward in the supplier's account for future distribution The question which their Lordships posed was whether the amount so returned or made returnable by the licensee to his consumers is deductible for ascertaining his taxable income from his business and they concluded after a consideration of certain decisions that the amounts so credited by the assessee were part of the excess amount paid to it and reserved to be returned to the consumers, which did not form part of the assessee's real profits. It would follow therefore that even before the gross profits of the employer are to be arrived at, these sums which, under the law do not form part

1. (1965) 2 S.C.J. 343 : (1965) 2 I.T.J. 234,

of the profits of the employee, have to be ignored It is not a case of a prior charge in the sense in which the Tribunal formula envisaged it It is an amount which should be deleted even before the computation of the gross profits is made It seems to me, therefore, that the Tribunal was not in error in holding that these amounts could not be added back in order to arrive at the surplus available for computation of the bonus.

The next item of dispute is the multiple shift depreciation. Objection has not been taken to the normal depreciation in respect of mains, overhead and underground, and house service connections. The management contended that as these parts of the machinery were on duty for all the 24 hours, they were entitled to an additional 50 per cent of the normal depreciation on account of multiple shift working This would be in accordance with the Income-tax law, but nevertheless, it has been argued by learned Counsel, that there is no evidence that these parts of the machinery are under *load* throughout the 24 hours and that multiple shift depreciation should not be allowed unless it was established that the machinery did suffer under constant load This question came before the Supreme Court in the case of the Management in W P. No. 657 of 1965. It is reported in *Tinnevelly Tuticorin Electric Supply Co.* v. *Its Workmen*[1]. That was a case where additional bonus was demanded and there also the claim of the management was that triple shift allowance should be granted. The argument advanced was that in respect of underground cables and wires and overhead cables and wires, as contrasted with the mains the Tribunal made a distinction in the matter of shift allowance. In that case the grant of triple shift allowance for the mains was not in dispute. According to the rules under the Income-tax Act, no extra shift allowance is allowable in respect of underground and overhead cables and wires The question arose before the Labour Appellate Tribunal whether they fell within the scope of electric plant, machinery, etc , which is item III-E (1) of rule 8 of Income-tax Rules or under item III-C (4) and (5) in respect of which the Income-tax authorities do not allow multiple shift depreciation. The Appellate Tribunal was not satisfied that such cables and wires would depreciate in value to a materially greater extent when electric energy was carried by them for more than one shift. On the materials which it had before it, the Appellate Tribunal decided against the grant of any extra shift depreciation in respect of underground and overhead cables and wires. Their Lordships of the Supreme Court while accepting the validity of this decision of the Labour Appellate Tribunal pointed out that their decision would not preclude the appellant-management from making a similar claim in future and justify it by leading proper evidence But the point was not specifically decided whether item III-E (1) or item III-C would apply

The Industrial Tribunal has referred to this decision. Reference has also been made by the Industrial Tribunal to a decision of this Court in W.P Nos 1453 and 1454 of 1956, where the question was decided in favour of the management. The Industrial Tribunal also discounted any weight to the plea that no such depreciation in respect of overhead and underground cables and wires had been claimed before the Income-tax authorities and that it should not therefore be allowed for the purposes of the present proceeding That contention was negatived by the Industrial Tribunal which held that it was allowable

It has been argued that the view taken by the Industrial Tribunal is erroneous and that these items are not machinery, being only stationery appendages to the machinery. Once again, it is claimed that when it is clear that the Income-tax authorities have not allowed any such depreciation and no claim was in fact made by the management before the Income-tax authorities, a different view should not have been taken in this regard

It is no doubt true that the Indian Income-tax Rules provide for a particular method of arriving at the depreciation in respect of buildings, machinery, plant or furniture. Rule 8 of these Rules fixes such allowance at certain percentages of

1. (1960) S.C.J. 734 : (1960) 1 L.L.J. 275.

the written down value or the original cost, as the case may be. Serial No III-E deals with ' electric supply undertakings ' and item (i) thereunder refers to electric plant, machinery and boilers Serial No. III-C is headed " Electrical machinery " and as against " switch-gear, instruments, transformers," etc , and " underground cables and wires " and " overhead cables and wires," there is a remark that " no extra shift allowance would be permissible ". The question is whether the procedure adopted by the Income-tax authorities should control the decision in the instant case Apart from the fact that such parts of " Electrical machinery " are under load for more than two shifts, there is undoubtedly depreciation caused by wear and tear due to continuous exposure In effect, whether they carry current or not at all times, they are undoubtedly on duty as it were right round the clock. Even the Income-tax law recognises the eligibility to grant of extra shift allowance computed at a percentage of the normal allowance For instance, under III (1) of rule 8 of the Income-tax Rules, as against " machinery and plant," an extra allowance up to a maximum of 50 per cent of the normal allowance will be allowed where a concern claims such allowance on account of double shift working Where there is triple shift working, an extra allowance up to a maximum of 100 per cent. of the allowance is also permissible It is not therefore an inflexible rule that an extra shift allowance cannot be granted Learned Counsel makes a somewhat unreasonable demand when he claims that the management should establish that every instrument or piece of machinery, stationery or otherwise, must be proved to have been working during the 24 hours He claims that there are occasions when a transformer is off duty, or when the cables are not carrying current It is really difficult to appreciate this claim Even in the case of machinery, there are occasions when the machinery is not working for the purposes of maintenance and the like That is a normal feature in the case of the use of machinery of any description It will be impossible for any management to record the duration when the machinery was not working, particularly in the case of an electric supply undertaking To my mind, it is not the circumstance that these underground cables and wires carry current that is the principal cause of their deterioration It is necessary to maintain these cables intact all the 24 hours of the day and that being so, that they are working on multiple shifts cannot be denied.

A recent decision of this Court dealt with the question in T C No 234 of 1962. The assessee in that case claimed a 10 per cent. depreciation on house service connections and posts, which was allowed by the Income-tax Officer, who held that the case fell under item III-E of rule 8 relating to electric supply undertakings. The Appellate Assistant Commissioner thought that the proper allowance would be only at 5 per cent. under item III-C (5), which is overhead cables and wires, against which the remark " No extra shift allowance " finds place in the rule. The Income-tax Appellate Tribunal however upheld the view taken by the Income-tax Officer and the question came before this Court on a reference The learned Judges observed:

> " It is clear from clause C that the electric machinery in general would include overhead cables and wires It is true in clause E no specific mention of overhead cables and wires is made But, in our opinion, on that ground it cannot be said that the electric machinery in clause C should be read as excluding from its scope overhead cables and wires. The use of the expression ' electric plant, machinery, boilers' in clause E appears to have been made in a comprehensive sense so as to include parts of the plant as well as electric machinery. Clause E seems to be in the nature of an exception to clause C and where it concerns electric supply undertakings, a consolidated rate is fixed for electric plant, machinery, boilers, without reference to the various parts which go to make the plant, machinery or boilers "

The decision accordingly was that these cables and wires form part of the electrical undertaking It would follow that if the electrical undertaking as a whole cannot be denied the benefit of an extra ft shiallowance, overhead wires and cables cannot be separately dealt with

I may mention at this stage that the decision of this Court in *The Management of Salem-Erode Electricity Distribution Co., Ltd.* v. *The Industrial Tribunal*[1] which had been

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1 W P. Nos 1453 and 1454 of 1956.

relied upon by the Industrial Tribunal was dealt with in *The Workers of Salem-Erode Electricity Distribution Co., Ltd.* v. *The Management*[1] The learned Judges referred to the decision in *Tinnevelly Tuticorin Electric Supply Co* v *Its Workmen*[2] During the hearing of these appeals, further particulars on certain technical aspects were called for. The learned Judges observed that the claim to triple shift allowance would be irresistible if the classification came under electric plant and machinery but did not however agree with the trial Judge that the claim could be brought under the head. But they thought that this was a technical problem upon which more light was necessary. They refer to a direction made by them calling for further material Then they state thus:

> " Apart from any question of interpretation of the relevant provisions or clauses or the scope of any such term as electricity plant and machinery, it should be manifest that there is an initial difficulty in conceiving of triple shift in relation to electricity distribution As we understand this concept of an added depreciation allowance for such machinery, it really implies that machinery which would normally have a period of rest was being employed during such extra shifts either as double shift or triple shift This increased wear and tear entitled the management to claim a special allowance But with regard to the distribution of electricity as distinct from its production, the technical problem is obvious when transformers, cable and overhead transmission lines which effect the distribution of energy have necessarily to be employed all the 24 hours if the energy is to be continuously supplied to the consumers "

The matter was not ultimately decided but was left open to the Industrial Tribunal for a complete adjudication after enquiry into all relevant aspects including technical aspects There is thus no finality in respect of that matter. But it seems to me that the observations which I have extracted above fully justify the view that if these items of machinery, as they may be loosely called, are in fact on duty for all the 24 hours of the day, they must necessarily be regarded as working on more than two shifts for which the Income-tax law makes a provision for depreciation. But, to my mind, in the context of a dispute with regard to bonus, being based upon the profits of the concern, it is not the Income-tax law that can possibly say the last word in respect of depreciation It would not be untrue to say that the Income-tax law makes allowances for depreciation only on a notional scale as it were and does not in all cases cover the true depreciation that a piece of machinery might suffer That has in fact been recognised in Labour law. The Labour Appellate Tribunal, which evolved the bonus formula, observes:

> " As depreciation allowed by the Income-tax authorities is only a percentage of the written down value, the funds set apart yearly for depreciation and designated under that head would not be sufficient for these purposes. "

I am accordingly satisfied that when once it cannot be denied that these items of machinery are on duty right round the clock, an extra shift allowance is permissible for the purposes of arriving at the distributable profits.

That the return on reserves used as working capital has to be deducted from the gross profits is not in dispute It is one of the deductions sanctioned by the Labour Appellate Tribunal's formula The difficulty in the instant case is as to the method of arriving at the quantum of reserves so used as working capital. In these cases, what the Tribunal has done will be apparent from the following passage from its judgment:

> " In a proper computation of the working capital, all the reserves available plus the total capital and depreciation reserves are taken together and the total block of investment is deducted and in this way the amount of reserves available and used as working capital is arrived at. To find out whether this amount was available for the year in question for the purpose of utilisation in the current assets as working capital, in addition to loans and other items which have been used as working capital, it is enough to point out that unless such amount was available and was used in the current assets the balance-sheet can never be balanced "

Earlier the Tribunal set out the contention that there was no evidence as to the reserves actually used as working capital and that the accountant examined on behalf of the management did not throw any light on the matter It proceeded to the definition of the term ' working capital ' in a text book on Book-keeping and Accounts, where a broad definition is given in this manner :

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1 W A Nos 75 and 116 of 1961 2 (1960) S C J 734 (1960) I L L J 275.

"Working capital is the amount by which the readily realisable, liquid or current assets of a concern exceed its current liabilities Thus, the total of a company's cash, investments, bills receivable, stock, book debts and similar liquid assets minus its trade credits, bank overdraft, bills payable and similar floating liabilities represents the working capital of the company In calculating such capital, the fixed and more or less permanent assets, such as buildings, plant, *etc*, and long or fixed period loans and similar 'fixed' liabilities are excluded "

Based upon this definition, the Tribunal thought that the term 'working capital' has to be taken to be the excess of the current assets over the current liabilities for the purpose of the bonus formula It virtually allowed interest at 4 per cent on the working capital which it computed in the above manner

It is obvious that there is an error in the procedure adopted by the Tribunal. The Labour Appellate Tribunal formula did not envisage the deduction of 4 per cent return on the entire working capital It will be noticed that a return of 6 per cent. is already allowed on capital invested in the concern Four per cent return contemplated refers only to reserves used as working capital, reserves which would otherwise belong to the company absolutely and which it utilised for the purpose of the concern. Merely to take the difference between the current assets and current liabilities would not result in determining the quantum of reserves used as working capital That may no doubt lead to the totality of the working capital, but what the Labour Appellate Tribunal formula takes into account is not the totality of the working capital of the company but only a part of it, that is to say, reserves of the company which have been used for the purpose of the concern It will be noticed that if these reserves were not so used and the company had needed funds for carrying on business, it would have to go into the open market and raise loans and pay interest thereon, which interest would be deductible even out of the gross profits But where the company makes available funds, which absolutely belong to it, for the purpose of working the company, then it is entitled to a certain amount of interest on the use of its money and that is deducted before the net profit out of which bonus is to be paid is arrived at The view taken by the Tribunal that 4 per cent return can be calculated on the working capital computed as the difference between the current assets and current liabilities is certainly erroneous

In *Bengal Kagazkal Mazdoor Union* v *Titagarh Paper Mills Co.*[1], their Lordships of the Supreme Court deal with the matter thus.

"It is now well-settled that a balance sheet cannot be taken as proof of a claim of what portion of reserves has actually been used as a working capital and that the utilisation of a portion of reserves as working capital has to be proved by the employer by evidence on affidavit or otherwise after giving opportunity to the workmen to contest the correctness of such evidence by cross-examination What happened in the present case was that the accountant of the respondent gave two alternative calculations for arriving at the reserves used as working capital Thus there were two figures given by the respondent to show what reserves were actually used as working capital. Further, according to the accountant, the lower figure represented the assets which could be at once converted into liquid cash while the higher figure represented both cash invested in the business and liquid cash that would be available He then went on to state that the amount was always available for utilisation as working capital and that it was actually utilised during the years. . We should have expected more positive evidence on the point which would have shown one figure, for reserves actually used as working capital could only be represented by one figure Though therefore the accountant did swear that the amount was used as working capital and his oath was apparently with respect to both figures, the respondent in the end was content to take the lower figure . "

The question was again considered in *Aluminium Corporation of India* v. *Their Workmen*[2], where also a claim was advanced on behalf of the employer that the balance-sheet of the company would by itself show what part of the reserves was used as working capital and that an easy and safe way of ascertaining the correct figure is by deducting the current liabilities of the company in the balance-sheet from the current assets shown therein Their Lordships no doubt observe that that would be a proper method for determining the working capital of the concern But they point out that mere statements in the balance-sheet as regards the current assets and current liabilities would not be taken as sacrosanct. But what is more important as emphasised in this judgment, is, it is not a question of determining the total working capital of the concern which is easy enough but to find out what portion of the reserves have been used as working capital. They say

1. (1964) 3 S.C.R. 38. 2. (1963) 2 L L J. 62.

" It may often happen that the whole of the working capital is provided from what remained of the subscribed capital after the acquisition of the fixed assets There may be other cases where a portion of the working capital is provided from the subscribed capital and the remainder is met from the reserves There appears to be a tendency on the part of some employers to show the entire amount of reserves available for use as working capital as the actual amount used for that purpose This is obviously wrong "

Obviously the return of 4 per cent. which has to be deducted is not upon the working capital but only on that portion of the reserves used as working capital, a distinction which the Tribunal has entirely overlooked The discussion in the award of the Tribunal is equally faulty in this regard, for the Tribunal observes.

" There is no reason whatever to doubt the figures in these documents, *viz*, calculation sheet by the management on the basis of F B formula and the work sheet Ex-M-2 The management has rightly claimed the lower figure of Rs 30,560 arrived at in accordance with the principles laid down for ascertaining the quantum of working capital "

To repeat, it is not the quantum of working capital that is entitled to a 4 per cent. return but the quantum of reserves used as working capital

The next point that may be taken up is the deduction on account of rehabilitation charges. It was contended before the Tribunal that in previous years much lesser amounts had been granted But the Tribunal discounted the plea of *res judicata*, for rehabilitation was in respect of a recurring and continuous process of wastage of assets and it could not be said that what was granted in one year should set the upper limit for the grant for all time. The Labour Appellate Tribunal pointed out that in order to secure recurring returns on money invested in any industrial undertaking, it is essential that the plant and machinery should be continuously in working order and such maintenance of plant and machinery would also be to the advantage of labour. The first charge on the gross profits should therefore be the amount of money that would be necessary for rehabilitation, replacement and modernisation of the machinery It was stated that an amount over and above what was allowed by way of depreciation by the Income-tax authorities would be necessary to be set apart annually to make up the deficit The validity of such a prior charge is not in dispute It is the manner in which the quantum is arrived at that gives rise to difficulties. It is also not in dispute that the onus of proof in this regard is upon the employer. What has been done in the present case is to take the anticipated life of the piece of machinery as given in the Indian Electricity Act In *Aluminium Corporation of India* v. *Their Workmen*[1], their Lordships of the Supreme Court observe:

" It has to be remembered in this connection that by a series of decisions of this Court it is now well settled that the burden to prove any prior charge under the head 'Rehabilitation' lies on the employer, and that unless the employer has by proper evidence established its claim to some amount as rehabilitation charge, the claim may be rejected "

In that case, what was done was virtually to value the assets of the company at two different points of time, and the several statements in which the rehabilitation charge was shown revealed different figures It was held there was no evidence to show how the multiplier or the divisor relevant to the question was arrived at. The rejection of the claim by the Industrial Tribunal for these reasons was sustained. Reference has also been made to *Bengal Kakazkal Mazdoor Union* v. *Titagar Paper Mills*[2]. It has been pointed out therein that the determination of rehabilitation is a long term affair and once it has been determined, it cannot go on increasing from year to year except in the case of a sudden appreciable rise in prices or on account of new blocks being added followed by further rise of prices after the purchase of the new blocks It was also held that in making any deduction on the prior charge in a particular year, the amount ear-marked for such purpose in the previous years and remaining unused should be taken into account

The Tribunal has examined the claim in the light of these and other decisions. It has taken notice of the fact that the multiplier has to be determined on the basis of the increase in the prices and the divisor should be arrived at on proof of the expecta-

1 (1963) 2 L L J. 629. 2 (1963) 2 L L J 358.

tion of life of the machinery. These are undoubtedly notional to a large extent. The Tribunal has also taken note of the fact that in so far as the machinery employed in the electrical undertakings is concerned, its economic life has been given in the VII Schedule to the Electric Supply Act and the estimate of life so given in the Act must be taken as having been reached after extensive study, research and actual experience. The difficulty really arises in finding the multiplier, for the probable cost of replacement at a future point of time has to be estimated and that must involve, as has been pointed out in decisions, a certain amount of guess work. This multiplier is the ratio between the cost price of the plant and machinery, and its probable cost price when it requires to be replaced If it is computed today that a piece of machinery has an expectation of life of ten years and its replacement would be called for at the end of ten years, it is obvious that an estimate of the probable cost of the machinery after ten years cannot be precise In making that estimate, the management has necessarily to depend upon the manner in which the prices have been increasing during the past Even if the management makes enquiry of manufacturing firms with regard to the cost of supply of a piece of machinery, that would only furnish the data as to the price at the present time and not its probable price at a future time It would therefore be unreal to insist that the management should have called for quotations and in the absence of any quotations, its estimate of the cost of replacement of the machinery involved must necessarily be ignored So long as the cost so estimated is not so disproportionate to the prevailing trend, it can reasonably be accepted, and the multiplier based on such an estimate cannot be said to be incorrect.

In *Titaghur Paper Mills Co , Ltd.* v *Its Workmen*[1], the question regarding rehabilitation was dealt with in this manner :

" When prices are stable or falling, there is no necessity of making further provision for rehabilitation, for the usual depreciation, provided for the purposes of Income-tax Act, is sufficient to build up a fund for replacement of plant and machinery when they are worn out, but when prices are rising, the usual depreciation fund is not enough to replace plant and machinery which become useless. This was particularly so after the end of the last war when the question of replacing machinery purchased before the war, *i e* before 1939 came up before the Full Bench of the Labour Appellate Tribunal in 1950 In order, therefore, to meet this particular situation arising out of a steep rise in prices, the Full Bench formula was evolved to provide for a further sum for rehabilitation out of the profits besides the statutory depreciation This was on a notional basis and depended upon a multiplier which was used to find out the current prices of machinery to be replaced and a divisor based on the useful life of the machinery to find out what sum should be provided each year for what was called rehabilitation "

After setting out that land, building and machinery should be separately dealt with in this regard, thay proceeded to deal with the machinery and observed :

" As for the machinery, there is again the necessity of further sub-division, according to when the machinery was purchased The machinery purchased before the last war stands on one footing and thus there will be a block of machinery which may be known as pre-1939 The second block of machinery may well be that purchased during the war and the last block that purchased after the war The last two are not rigid divisions , butthey indicate that machinery has to be divided into blocks according to the years of purchase to arrive at a correct multiplier and a correct divisor "

Thereafter they entered into a closer examination of the facts of that particular case and the correctness of the method of determining the multiplier or the divisor therein

It is clear, therefore, that when the question of rehabilitation has to be considered and the probable value of the machinery that would require replacement has to be determined, a certain amount of guess work is inevitable For instance, an item of machinery which might have been purchased, say in 1955, and which has a normal expectation of life of about 20 years, would require to be replaced only in in 1975 What the formula requires is the probable value of the machinery, when it requires to be replaced, that is in 1975 To a certain extent, only the trend of prices can be had regard to, in order to ascertain the probable price of the machinery in 1975 There should therefore be some evidence to show that in the case of

1. (1959) 2 L.L.J. 9.

machinery, the prices have been increasing from the date of its purchase and on the basis of this increase its probable value in the future has to be estimated. If the value was, say Rs 1,000 in 1955, and the trend of increase shows that it has doubled itself within last 10 years, it may not be unreasonable to say that by 1975 its value might be roughly four times the 1955 value Four (4) would accordingly be the multiplier and 20, normal expectation of life of the machinery would be the divisor. In so far as the divisor is concerned, in these cases, the Tribunal has adopted the expectation of life of the machinery as given in the statute, that is, the Electricity Act. I shall deal with it later. But on the question whether there was evidence to justify the adoption of any particular multiplier for various blocks of machinery, it seems to me that the evidence is singularly weak and unacceptable. In the case cited, their Lordships obvserved

> " It is the company which is claiming that a certain multiplier be used for calculating rehabilitation reserve, and it was its duty to produce good and sufficient evidence as to the current multiplier if it wants that multiplier to be used .. . "

In *A C C & others* v. *Their Workmen*[1], it is observed :—

> " The decision on the question of the probable cost of rehabilitation is always reached by adopting a suitable multiplier This multiplier is based on the ratio between the cost price of the plant and machinery and the probable price which may have to be paid for its rehabilitation, replacement or modernisation Since there has been a continuous rise in the prices of industrial plant and machinery the older the plant which needs rehabilitation the higher is the multiplier That is why there is always a competition between industry and workmen on this point Industry is sometimes tempted to keep its old pre-1939 block alive with a view to claim a higher multiplier which gives it a larger amount of rehabilitation expenditure , whereas workmen urge that the old pre-1939 block has been nominally kept alive as a device and so press for a lower multiplier which would reduce the claim for rehabilitation . .. . . "

They further observed :

> " In dealing with the employer's claim for rehabilitation, tribunals have always placed the onus of proof on the employer He has to prove the price of the plant and machinery, its age, the period during which it requires replacement, the cost of replacement, the amount standing in the depreciation and reserve fund, and to what extent the funds at his disposal would meet the cost of replacement If the employer fails to lead satisfactory evidence on these points tribunals have on occasions totally rejected his claim for rehabilitation . . If the tribunals are satisfied that the employer is deliberately and without sufficient cause not taking any steps to rehabilitate, replace or modernise his machinery even though an appropriate allowance is made in that behalf from year to year, they may take into account his conduct in determining the extent of such allowance in the bonus year in question . ... "

These observations clearly indicate that it is the duty of the employer to place acceptable evidence in support of its contention that a particular multiplier should be adopted.

Though evidence of some kind has been adduced by the employer in these cases and statements were also submitted, in so far as the probable price of the machinery is concerned, admittedly the evidence was puely speculative. It was rightly pointed out on behalf of the workmen that no quotation of any kind with regard to the prices of machinery which would show the trend of increase in prices was produced. That complaint is fully justified. The only evidence that I can find is the broad statement given by Mr Narayanamurthy, M W. 2, that the Electric Supply undertaking was spending about Rs 15 lakhs each year and nothing more could be done on account of paucity of funds which rehabilitation required. Mr. Krishnaswami, M.W. 1, the accountant of the Salem-Erode Electricity Distribution Company, stated that from the accounts, details of the values as at the time of purchase could be gathered. He could give no evidence as to which assets were replaced and which were rehabilitated. The entirety of his evidence does not reveal any material on the basis of which a proper multiplier for each block could be arrived at. The statement filed on behalf of the employer no doubt gives a figure as ' multiplier '. But it is obvious from the decisions which have been cited that there must be evidence which would justify the adoption of a particular multiplier It cannot possibly be left to the whim and fancy of the employer. Such evidence as the decisions demand is certainly lacking in the present cases.

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1 (1959) 1 L L J 644

The contention on behalf of the workmen has been that the adoption of the divisor in these cases is incorrect and that there should be evidence with regard to the probable life of each group of machinery. It is true that the decisions do require evidence upon this head. All the decisions have dealt with textile and other companies. The present cases relate to Electricity Supply Undertakings which are governed by special enactments It is not disputed that these enactments contain a schedule according to which the probable life of any item of machinery is fixed for the purposes of the Act. It is this extent of probable life that has been taken as the divisor in the present cases. I am not willing to agree that the adoption of these figures as divisor is in any way erroneous. When the statute lays down the probable life of various items of machinery concerned in electricity undertakings, it must have been arrived at after a note had been taken of the facts relating thereto It is hardly likely that the Legislature is in laying down certain figures acted arbitrarily In any event, anticipation of the life of the machinery as found in the statute is certainly a piece of evidence and the adoption of these figures as the divisors is not improper. But since there has been no evidence justifying the adoption of the multipliers used in the cases, the Tribunal was not justified in accepting the figures given by the management.

The conclusion reached by the Tribunal on the head of rehabilitation is certainly not in accord with the principles laid down in the decisions. Mr M.R. Narayanaswami, learned Counsel for the employers, contended that even making every allowance demanded by the workmen it is impossible that there could be that amount of surplus to justify the grant of three months' additional bonus. He argued that three persons are entitled to share in the surplus, the management, the workmen and the shareholders. Even assuming that all the contentions of the workmen with regard to the calculation of the surplus are correct, that could still not yield that amount of surplus which would justify the grant of additional bonus of three months' salary. That may be so It is true that the workmen have claimed bonus for three months. But what the Tribunal is called upon to determine is the quantum of surplus available according to the formula of the Labour Appellate Tribunal and thereafter to determine what amount of bonus could be given to the workmen. Whether it is three months' bonus as demanded by the workmen or less would depend upon the ascertainment of the surplus. Mr. Narayanaswami's argument only suggests that the claim of three months' bonus is extravagent and cannot possibly be met. That, as I said, might be so. But, if, on the actual working of the surplus, the workmen are entitled to some bonus, whether it be 15 days' wages or one months' or more, that has to be granted. What is important is the ascertainment of the surplus.

At least on two points, *viz*, on the question of rehabilitation and the allowances for the return on reserves used as working capital, the Tribunal has erred and its conclusions are inconsistent with the decisions referred to above. If follows, therefore, that the award of the Tribunal was to be quashed The Tribunal will reconsider these two questions in the light of the observations contained herein and make such orders on the reference, as may be justified

The Writ Petition is allowed but there will be no order as to costs

R.M *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE T. VENKATADRI.

Padmakan Singh and another .. *Petitioners**

v.

The Third Joint Sub-Registrar, Coimbatore and others .. *Respondents.*

Registration Act (XVI of 1908), sections 60 and 61—Certificate of registration and endorsement—Non-compliance with provisions of—If affects validity of registration.

Payment of Taxes (Transfer of Property) Act (XXII of 1949), sections 2 (ii) and 3—Notice issued by Income-tax Officer to the Registering Authority not to register a document—If amounts to a statutory declaration under the sub-section.

Where a document has been registered, by the Registering Officer in the sense that all the formalities such as payment of consideration and admission of execution, etc., have been complied with, the mere fact that the Registering Officer has not made the certificate of endorsement 'registered' as required by section 60 and 61 of the Registration Act cannot affect the registration.

A letter from the Income-tax Officer asking the Registering Officer not to register a document is not the same as a statutory declaration under section 2 (ii) of the Payment of Taxes (Transfer of Property) Act, 1949.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewih the High Court will be pleased to issue a writ of *mandamus* to the respondents to deliver to the petitioner's nominee the deed of simple mortgage executed by the petitioner in favour of the Coimbatore Vasunthara Bank Ltd., the 4th respondent herein and registered on 15th July, 1963. Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed there-with the High Court will be pleased to issue a writ of *mandamus* to the first respondent to deliver to the petitioner the deed of simple mortgage executed by Srimathi Padmakan Singh, the fourth respondent herein, in favour of the petitioner Bank and registered on 15th May, 1963.

R. Vedantan for *K. C. Jacob, S. K. L. Ratan* and *M. X. Cardoza,* for Petitioner.

K. Alagiriswami, for the Additional Government Pleader, for Respondents 1 and 2.

V. Balasubramanyam, for 3rd Respondent.

V. Thyagaraja Iyer and *R. Desikan,* for 4th Respondent.

The Court made the following

ORDER.—These two writ petitions are filed by the mortgagor and the mortgagee respectively, for the issue of a writ of *mandamus* to deliver to them the deed of simple mortgage executed by the mortgagor (Padmakan Singh) in favour of the mortgagee (The Coimbatore Vasunthara Bank Limited) and registered on 15th May, 1963.

The circumstances that led to the filing of the writ petitions are these: Srimathi Padmakan Singh, the petitioner in W.P. No. 799 of 1963, is a permanent resident of Coimbatore. She owns the property No. 17/73, Oppanakara Street, Coimbatore. Her husband is carrying on business at Coimbatore, and is assessed to income-tax. She applied to the Coimbatore Vasunthara Bank for a loan of Rs. 50,000 on the mortgage of her house mentioned above. As she did not desire to attend the office of the Registering Officer, she wrote a letter on 15th May, 1963 requesting the officer, the Third Joint Sub-Registrar, Coimbatore, to go over to her residence, for the purpose of registering the document, on payment of the necessary fees. The Sub-Registrar came to her residence on 15th May, 1963. The Sub-Registrar showed her a letter, in which it was alleged that income-tax assessment proceedings against

* W.P. Nos. 799 and 912 of 1963. 8th November, 1966.

her husband were pending, that the property which she held in her name was really benami for him, and that no document dealing with the said property should be registered Nevertheless, the Sub-Registrar proceeded with the registration of the document The mortgagor admitted the execution of the document The particulars were endorsed The money payable to the mortgagor was paid by the mortgagee's agent, in the presence of the Sub-Registrar, and an endorsement to that effect was also made on the document. The registering officer also affixed his signature and date to the document Afterwards, the Sub-Registrar took the document, in order to copy the contents of the document in Book No. 1, and the document was given the number P. 20/63 in Book No. 1, but there is no word "registered".

Thereafter, the Sub-Registrar addressed a letter on 16th May, 1963, to the District Registrar, Coimbatore, seeking his instructions, in view of the letter received by him from the Income-tax authorities, before taking further proceedings of the completion of the registration of the document The District Registrar directed the Sub-Registrar not to complete registration of the document, unless the mortgagor produced a certificate to the effect that she had paid all the income-tax, presumably due and payable by her husband The District Registrar, Coimbatore, also wrote a letter to the mortgagor on 12th July, 1963, that a declaration had been received by him under section 2 (ii) of the Payment of Taxes (Transfer of Property) Act, Act XXII of 1949, from the Income-tax Officer, and directed her to produce a certificate under section 3 of that Act The District Registrar also stated that the document in question had not yet been admitted to registration

The mortgagor has stated that she is a person permanently residing in India and does not propose to leave India, that as far as she is concerned she has no hesitation to pay whatever amount is due and payable by her to the Income-tax Department by way of tax, presumably meaning thereby that she is not responsible or liable to pay the amount of tax due and payable by her husband.

According to the mortgagor on 15th May, 1963, there was no declaration such as that provided in section 2 (ii) of the Payment of Taxes (Transfer of Property) Act, which prevented the registration of the document and, inasmuch as having accepted the document and having complied with all the formalities under the Registration Act, there was no choice left with the registering officer except to comply with the other formalities under the Act and deliver the document.

As far as the mortgagee-Bank is concerned, their contention is that they have no knowledge of any claim of tax due and payable by the mortgagor, that the title to the property is in the name of the mortgagor, having been purchased in her name on 8th February, 1960 and that the registering officer cannot therefore raise any question of title in the form of benami in these proceedings They also contend that the declaration as mentioned in the Payment of Taxes (Transfer of Property) Act, made by the Income-tax Department was received by the registering officer after the date of registration, and that on the date of registration there was no declaration as contemplated in section 2 (ii) of the Act, and further the provisions relating to transactions of immovable property to defraud the Revenue have nothing to do with the present transaction nor with the registration of the document. The Bank also contend that the Sub-Registrar has failed to discharge the statutory duty imposed on him by the Act, that he has no discretion in the matter and no question of admitting or not admitting the document for registration arises in the present case, and that, on the date of the registration of the document the registering officer was not in possession of any declaration as such made by the Income-tax Officer, nor was there any demand for arrears of tax from the mortgagor and that any subsequent declaration made after the registration would not make the registration of the document void and illegal, and that even otherwise the Bank has nothing to do either with the declaration of the title to the property inasmuch as they have advanced money on the security of the property in the presence of the Sub-Registrar.

The contention of the Income-tax Officer seems to be that this enquiry revealed that the property belongs to the husband of the mortgagor and that the mortgagor is only a benamidar and that she has no title to the property. Her husband owes

a large amount of tax to the Department in respect of his business, and assessment proceedings are pending and the Department has taken the precaution, long before the date of registration, by informing the registering officer not to register any document purporting to effect any transfer of the house belonging to the mortgagor. All the correspondence that passed between the Income-tax Officer and the registering officer should be taken and read together and, in the context, be regarded as relative declaration under section 2 (ii) of the Act Even otherwise, the process of registration is not complete without the endorsement 'registered' on the instrument and, before that step could be taken, the registering officer has been lawfully prohibited by a valid declaration under section 2 (ii) of the Payment of Taxes (Transfer of Property) Act, 1949

The contention of the registering officers is that they are within their jurisdiction in withholding registration of the document They contend that the document has only been accepted for registration but not actually registered

On a perusal of the pleadings, the important question that arises for consideration is, when a document can be said to be registered, in other words, what are the requirements necessary for the completion of the registration of a document.

In *Veerappa Chetty* v. *Kadiresan Chetty*[1], a Division Bench of this Court, after posing the question what is the meaning of the word 'registered' proceed to observe thus:

"The statute refers to various stages which have to be completed before a document becomes registered instrument Section 35 provides that, when the registering officer has satisfied himself that a document has been executed by the persons purporting to execute it, he 'shall *register* the document as directed in sections 58 to 61 inclusive' Registration, therefore, consists of the acts mentioned in sections 58 to 61 ... . Section 6 provides that the officer should endorse a certificate containing the word 'registered' together with the number and page of the book in which the document has been copied after the provisions of sections 34, 35, 58 and 59 have been complied with and he is then to sign, seal and date the certificate . ... The section proceeds to say that 'the registration of the document shall thereupon be deemed complete."

In the present case, all the formalities have been completed by the Sub-Registrar, except compliance of the provisions mentioned in sections 60 and 61, namely, the endorsement of the certificate 'registered' and then copying into the margin of the Register book. The point for consideration is whether the mere omission to endorse the word 'registered' would affect the registration of a document

The whole object of the Registration Act is to guard against fabrication of documents of title from time to time, and the real purpose of registration is to check forgery and to provide good evidence of the genuineness of the written documents. Registration is mainly required for the purpose of giving notoriety to the deed and to provide a guarantee of the genuieness of the instrument. The evidence of registration is itself some evidence of execution against the person by whom it purports to be executed The certificate of registration is some evidence of execution against the party making admission It is true that a certificate of registration is evidence that a document was duly registered. It gives the document the character of a registered document The certificate, though it may be indicative and afford proof of due registration, does not by itself effect registration. The endorsement to be made by the Sub-Registrar under section 60 is only a relevant evidence of proving facts mentioned in the endorsement. The certificate of registration endorsed on a document, though *prima facie* evidence that the document has been duly registered, is not conclusive evidence of valid registration. The mere omission of the registering officer to affix his seal to the endorsement of registration is not a defect fatal to the validity of registration of the instrument

There is a conflict of opinion among High Courts in India, as to what is the effect of non-compliance of the provisions mentioned in sections 60 and 61 of the Regis-

1. (1913) 24 M.L.J. 664 at 666.

tration Act In the earliest case on the subject, *Sita Nath Bandopadhya* v *Bissessur Roy Chaudhuri*[1], the learned Judges of the Calcutta High Court observed that the sealing of a deed was not an essential part of the act of registration, and that the omission of the registering officer to seal a deed was a mere defect of procedure, and the defect was cured by the provisions of section 87 of the Registration Act In *Sobhanath Singh* v. *Pirthipal Singh*[2], the Sub-Registrar came to the residence, the document was presented to him, the deed was properly executed and attested and the necessary formalities of registration were gone through and the provisions of sections 34, 35 58 and 59 were complied with Thereafter, the Sub-Registrar issued the usual receipt under section 52 and kept the document for being copied in Register No I and for endorsing the final certificate of registration as required by section 60 (1). While so, the document was snachted away from the custody of the registering officer The question was whether the deed executed operated to effect the transfer of the properties covered by it The Chief Court of Oudh observed that it was the compliance with the provisions of sections 34, 35, 58 and 59 which constituted registration of a document and not the presence of the certificate under section 60 of the Act, that the subsequent formalities were mere ministerial acts and that the defects occasioned therein by the acts or omission of the Registrar or irregularities in carrying out the duties enjoined by sections 60 and 61 would merely constitute defects of procedure for which neither the donor nor the donee was responsible In *Kishangopal* v. *Nathulal*[3], a Division Bench of the then Madhya Bharat High Court observed that, where a document was registered by a Registrar after complying with the provisions of sections 58 and 59 but he failed to make an endorsement as required by section 60, the defect was a defect of procedure, which did not render the registration invalid, by reason of section 87 of the Registration Act.

But, in *Mt. Domini Kuer* v *Ramsaran Lal*[4], a Division Bench of the Patna High Court observed, after dealing with the provisions contained in sections 34, 35, 52, 58, 60 and 61 of the Indian Registration Act, thus :

> " From the above provisions of the Act, therefore, we gather that the registration of a document is deemed to be complete under section 61 (2) of the Act, only when the document has been copied into the margin of the Register-book as required by section 61 (1) of the Act From the above scheme of the Act, therefore, there is no doubt that the registration of the document shall be deemed to be complete only when it is copied, and not otherwise "

In *Sharnappa* v. *Pathru Saheb*[5], there was compliance with the provisions of sections 34, 35, 52, 58 and 59 but not with the provisions of sections 60 and 61 of the Registration Act. A Division Bench of the Mysore High Court observed that the non-compliance with the provisions of sections 60 and 61 (1) could not be said to be merely defect in procedure but was a total violation of the provisions or requirements of the Act which made the registration of the document incomplete

In the two decisions cited above, it is not stated as to what would be the effect of such a document, whether it would invalidate the whole transaction and whether the document becomes void by reason of non-compliance with the provisions of sections 60 and 61 of the Act Under the circumstances, I would prefer to follow the opinion expressed by the Calcutta, Oudh and the Madhya Bharat High Courts, as the reasoning there appears to me to be logical and reasonable In the instant case, only the word ' registered ' was not endorsed on the instrument The contents of the document have been copied and a number has also been given to the document And the Sub-Registrar would have endorsed on the document ' registered ' as required by section 60 (1) of the Act, but for the intervention of the Income-tax authorities, directing him not to register the document The registering officer has no jurisdiction to refuse registration of a document and, as observed by their Lordships of the Privy Council in *Kalyanasundaram* v. *Karuppa*[6],

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1. 6 C W N 528
2. A I R. 1948 Oudh 223.
3. A I R. 1956 M B 236
4. A I R. 1957 Pat. 545 at 548.
5. A I R 1963 Mys 335
6. L R 54 I A 89 . 52 M L J. 346 . A I R. 1927 P C 42 at 44.

" Registration is the act of an officer appointed by law for the purpose, who if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period "

In this case, the Income-tax authorities intervened in the course of the transaction directing the Sub-Registrar not to register the document, on the ground that the property was purchased benami in the name of the mortgagor, and that the mortgagor's husband owed a large amount of tax and that he had not been given a clearance certificate It is to be remembered that the document in question was presented to the Sub-Registrar by the mortgagor at her residence on 15th May, 1963 Just then, the Sub-Registrar produced a demi-official letter, said to have been addressed to him, in which it was alleged that income-tax assessment proceedings against the mortgagor's husband were pending, that the property in question was really benami for him and that no document dealing with the said property should be registered But the District Registrar has, in his affidavit, stated that, as the parties insisted upon the acceptance of the document for registration, the Joint Sub-Registrar, on the instructions of the District Registrar, attended at the private residence of the petitioner (mortgagor) on 15th May, 1963, accepted the document, recorded her admission of execution and the payment of the mortgage money on the document and kept it pending without registration, as a doubt was felt on the point whether the document could be registered or not, in view of the communication of the Income-tax Officer dated 15th December, 1962

It is, therefore, necessary to say, somewhat in detail, the part played by the Income-tax authorities, in this matter of registration The Income-tax authorities got information that the husband of the mortgagor, in view of the pressure of the impending back assessments against him, was likely to leave India for good and settle elsewhere disposing of the house in Coimbatore Therefore, by their letters dated 14th December, 1962, and 15th December, 1962, the authorities requested the Sub-Registrar not to register any document executed by Sippy (husband of the mortgagor) or his wife (mortgagor) or both for transferring the ownership of the building The whole tenor of both these letters seems to be a sort of warning to the registering officer not to register such a document. This is evident from the reply of the Joint Sub-Registrar, Coimbatore, dated 20th December, 1962, wherein it is stated that suitable action will be taken if and when the document in question is presented for registration Nothing happened afterwards till 15th May, 1963 when the document was presented for registration On 15th May, 1963 in spite of the warnings received from the Income-tax authorities, the Sub-Registrar, on the advice of the District Registrar, proceeded in the matter of the registration of the document Then, on 18th May, 1963, the District Registrar addressed a letter to the Income-tax Officer, Coimbatore, asking him whether there was any statutory provision requiring a registering officer to refuse registration of any document presented by a person, against whom a requisition has been received from the Income-tax Officer to refuse registration On 27th May, 1963, for the first time, in reply to the letter of the District Registrar, the Income-tax Officer, Coimbatore, referred to the provisions of the Payment of Taxes (Transfer of Property) Act, 1949 and stated that that letter might be treated as a declaration issued by him under section 2 (ii) of the said Act Therefore, for the first time the declaration was made only on 27th May, 1963 By that time, the document had already been executed by the mortgagor in favour of the mortgagee (Bank), the execution of the document was admitted before the Sub-Registrar, it was duly attested, consideration passed, the Sub-Registrar made an endorsement on the back of the document, a receipt also was passed, the document was taken by the registering office to his office for being copied and a number was also given to the document (P-20 of 1963 of Book I). The word 'registered' was not endorsed As this is only a ministerial act and the omission to do it is only a procedural defect, the omission to make the endorsement would not invalidate the registration I do not also think that the Income-tax authorities can question the transaction as one made after the registering officer received the declaration.

But learned Counsel for the Income-tax Department would contend that the letters dated 14th December, 1962 and 15th December, 1962 should be treated as declaration under section 2 (ii) of the Payment of Taxes (Transfer of Property) Act, 1949 If so read, they are certainly before 15th May, 1963, the date of registration of the document

Under section 3 of the Payment of Taxes (Transfer of Property) Act, 1949 no registering officer can register any document purporting to transfer or assign any right, title or interest in any property, unless it is certified by the Income-tax Officer of the area in which the property is situate in respect of the person whose right, title or interest in the property is to be so transferred or assigned that such person is not liable to assessment or taxation, that such person has either paid or made satisfactory provision for the payment of all existing or anticipated liabilities and that the Income-tax Officer is otherwise satisfied that the registration of the document will not prejudicially affect the recovery of such liabilities This statutory declaration prohibits any transfer of immovable property belonging to income-tax assessees. When property rights are involved, and when such rights are affected by such declaration it should and must specify in greater detail how those transactions are to be prohibited under the Act It is absolutely necessary and essential that the legal authority and the jurisdiction under which it has to be exercised should be mentioned It is also necessary to assert the provision of law and to give a short and simple statement of the case The letters dated 14th December, 1962 and 15th December, 1962 are all in the nature of warning in general terms given to the registering officer, not to register any document purporting to effect a transfer of the property, as otherwise it would be difficult for them to collect the taxes due from the mortgagor's husband That was the reason why the District Registrar addressed a letter on 18th May, 1963 to the Income-tax Officer to inform him of the provision of law requiring the registering officer to refuse registration in such contingencies It is clear, therefore, that the letters dated 14th December, 1962 and 15th December, 1962 are not statutory declarations as required by section 2 (ii) of the relevant Act.

Further, the mortgagor is not the person concerned in the controversy She is not stated to be in arrears of tax to the Department Assessment proceedings are pending against her husband The property mortgaged in favour of the Bank is her property. The Department now asserts that the property is held *benami*. The burden of proof is upon the Department And this is neither the occasion nor the place for the registering officer either to consider or to decide whether the property really belongs to the mortgagor When the mortgagor requested the registering officer to return the document after complying with the provisions of sections 60 and 61 of the Registration Act, it was then that she was informed that there was a statutory declaration prohibiting the registering officer from completing the registration.

It is next contended that a writ of *mandamus* cannot issue, because this Court cannot go into or question the opinion formed by the Income-tax authorities that the mortgagor's husband was likley to leave India without settling the income-tax due to the Department I am not going into that question in these proceedings. The mortgagor and the mortgagee are only seeking the return of the document which was registered on 15th May, 1963 All the formalities mentioned in sections 34, 35, 58 and 59 of the Registration Act have been complied with The endorsement 'registered' is the only thing to be done The registering officer is a public officer, and the petitioners want this Court to direct him to carry out the duty which has been imposed on him by the statute. He is refusing to exercise the jurisdiction of returning the document to the proper party Lord Goddard, C J observed in *R.* v. *Metropolitan Police Commissioner, Ex-Parte Parker*[1] :

" *Mandamus* will lie to any person who is under a duty imposed by statute or by the common law to do a particular act, and if a person refrains from doing the act or refrains from wrong motives

1. (1953) 1 W.L.R. 1150.

from exercising a power which it is his duty to exercise, this Court will by order of *mandamus* tell him to do it *Mandamus* may go to individuals It may go to corporations and goes quite independently of whether the individual or body to which it is addressed is or is not a Court "

Under the circumstances, the rule is made absolute.

The petitions are allowed. No costs.

V. S. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR JUSTICE P S. KAILASAM

M. Venkatesan and others .. *Petitioners**

v.

The Secretary, Regional Transport Authority, South Arcot District, and others . *Respondents*

Motor Vehicles Act (IV of 1939), section 60 (1)—Power of cancellation and suspension of permit under—If could be delegated to different authorities

Section 60 of the Motor Vehicles Act provides for imposing the punishment of cancellation as well as suspension of a route permit relating to a transport vehicle It is now well settled that by virtue of section 44 (5) of the Act and rule 134-A of the Rules framed under the Act, an authority under the Act can delegate his functions to another subject to such conditions as may be prescribed There can be no objection to one authority being empowered to cancel a permit and another authority being empowered to suspend the same It cannot be said that the power to cancel and the power to suspend a permit under section 60 (1) of the Act is indivisible and cannot be separately delegated. Issue of a warning is not, however, one of the punishments which the Regional Transport Authority's Secretary is empowered to order and such a warning will be one without jurisdiction

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the orders in R No A3/22259/65 dated 10th August, 1965 on the file of the respondent in W P. No 4280 of 1965 in Appeal No 874 of 1964 and in Proceedings R No. 28780/A6/64 dated 27th February, 1965 and 5th October, 1964 respectively on the file of the respondents 2 and 1 respectively in W P No 4294 of 1965 in Appeal No 339 of 1965 dated 29th September, 1965 on the file of the 2nd respondent in W P. No. 4370 of 1965 and in R No 37098/A6/65 dated 13th October, 1965 on the file of the respondent in W P. No 4397 of 1965 and quash the orders made therein

K K. Venugopal, C S. Prakasa Rao and *M N Rangachari*, for Petitioner.

The Additional Government Pleader, for State

The Court made the following

ORDER —In all these Writ Petitions a common question of law is raised and therefore can be conveniently dealt with together. Mr Venugopal, learned Counsel for the petitioners, submitted that the delegation of the power of the Regional Transport Authority under section 60 of the Motor Vehicles Act to suspend a permit to the Secretary, Regional Transport Authority, is invalid and unsustainable in law. Shortly put, the contention of the learned Counsel is that while under section 44 (5) of the Act the Regional Transport Authority may delegate the power of cancellation and suspension of a permit to the Secretary, he cannot delegate only the power of suspension without the power of cancellation

Section 44 (1) empowers the State Government to constitute Regional Transport Authorities to exercise and discharge in the areas specified the powers and functions conferred on those authorities Section 45 prescribes that an application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles Section 60 of the Act provides that the transport authority which granted a permit may cancel the permit or may suspend it for such period as it thinks fit on the grounds specified in clauses (*a*) to (*f*) of section

* W.P. Nos. 4280, 4294, 4370 and 4397 of 1965. 29th June, 1966.

60 (1). It may be noted that the transport authority has the power to cancel a permit or suspend it Section 44 (5) of the Act empowers the Regional Transport Authority, if authorised by Rules made under section 68, to delegate such of its powers and functions to such authority or person and subject to such restrictions, limitations and conditions as may be prescribed by the said Rules Section 68 confers on the State Government the power to make Rules for the purpose of carrying into effect the provisions of Chapter IV of the Act. Clause (*zz*) empowers the Government to frame Rules in any other matter which is to be or may be prescribed Rule 134 (*a*), which is impugned, is one of the rules framed in exercise of the rule-making powers vested in the Government by section 68 (*zz*) of the Act It is unnecessary to consider the validity of section 44 (5) or the validity of rule 134-A (xi) for the question has been elaborately considered by a Bench of this Court in *Dhanmull Sowcar* v *Secretary, Regional Transport Authority, Vellore*[1]. The Bench held that rule 134-A item (xi) fell within the scope of section 68 of the Act and it is a rule prescribed for the purpose of carrying into effect the provisions of Chapter IV within the meaning of section 68(1) of the Act It also agreed with the decision reported in *Krishnan* v *Secretary, Regional Transport Authority, Chittoor*[2], where it was held that rule 134-A was valid It cited with approval an unreportd Bench decision of this Court in *Star Transport, Ltd* v. *Regional Transport Authority, Kurnool*[3], where it was held that the Regional Transport Officer was acting well within the scope of the provisions of the Act in passing the order of suspension and once a function is among those prescribed by the Rules, the delegation cannot be challenged

Mr. Venugopal, in view of the decisions quoted above, did not seek to question the validity of rule 134-A (xi) on any of the grounds raised before the Bench. But he contended that the power conferred on the Regional Transport Authority under section 60 (1) for cancellation as well as suspension of the permit is an integral power and cannot be split as a power to cancel a permit and a power to suspend a permit It was submitted that the power to take action against a permit and cancel it or suspend it for breach of any of the conditions is enumerated in clauses (*a*) to (*f*) of section 60 (1) Cancellation or suspension it was contended is only a punishment and not an exercise of power Learned Counsel also pointed out that section 44(5) empowers the Regional Transport Authorityto delegate such of its powers to a particular authority The powers that can be delegated can only be, it was submitted, to take action by it by cancellation and by suspension I am unable to appreciate the contention that the power to cancel and the power to suspend is an integral one and cannot be separately delegated Section 60 clearly provides for imposing the punishment of cancellation as well as suspension There can be no objection to one authority being empowered to cancel and another authority being empowered to suspend As already observed, rule 134-A (xi) delegating the power to suspend a permit has been upheld by this Court

Learned Counsel next relied on an unreported decision of this Court in W P Nos 730 and 734 of 1951 where it was held that the power of granting stay cannot be delegated to a different authority from an authority exercising the power of revision, as the power of revision and the power to grant stay is an integral part of the revision and could not be split This decision cannot be of any assistance to the petitioner, for, the wording of sub-section (1) of section 134 which provides that an appeal or an application for revision shall not operate as a stay of the order passed by the original authority and such order shall remain in force pending the disposal of the appeal or the application for revision, unless the prescribed appellate authority or revisional authority otherwise directs So far as the powers of cancellation and suspension are concerned they are entirely different and cannot be compared with the power of entertaining revision and granting stay

It was next contended by Mr Venugopal, learned Counsel for the petitioner, that rule 134-A (xi) renders the entire procedure unworkable and creates considerable difficulty, and as such the Legislature could not have intended it. He sub-

1. (1957) 1 M L J 314
2. (1956) An W R 142.
3. W P No 87 of 1951.

mitted that when the Regional Transport Authority delegated the power to suspend, it is divested of the power to deal with cases of suspension, and therefore when he finds that the case is not a fit case for cancelling the licence, he cannot proceed to suspend the licence In support of his contention that when once a power is delegated the principal is divested of that power, learned Counsel relied on the decision reported in *Blackpool Corporation* v *Locker*[1] The facts of the case as given in the headnote are as follows On 20th June, 1946, a requisition notice was served on the defendant under Reg 51 (1) stating that the Town Clerk of B had that day taken possession of the premises A sustantial quantity of the defendant's furniture remained on the premises, but the requisition notice contained no direction as to its disposal. The proposed purchaser withdrew from the transaction, and on 26th June, the defendant went into occupation of the house, intimating to the Town Clerk that he intended to use it as his own residence On 29th July, in the course of correspondence which ensued, the Town Clerk stated that the Ministerof Health wished him to emphasise that the defendant had committed an offence under the Defence Regulations, that he was a trespasser, and that the premises must be vacated forthwith On 20th August, in a letter to the defendant's Solicitors, the Minister of Health purported to confirm the Town Clerk's actions, and on 28th November, the Minister, by letter to the Town Clerk, purported to ratify all the actions of the Town Clerk in connection with the premises On the facts of the case, it was held that the original attempt at requisition on 20th June, was inoperative because, in breach of the conditions or limitations applicable to the delegated powers, the notice purported to requisition the house and its contents and contained no direction as to the exclusion or disposal of the chattels It was further held that the result of the letters of 29th July, and 20th August, was not to effect a requisitioning of the premises by the Minister himself, because (*a*) the Minister had not in his sub-delegated legislation reserved power so to act ; and (*b*) the Minister did not, in fact, then requisition or take possession of the premises, and the Minister, when delegating his powers, had for the time being divested himself of those powers, and, therefore, he had no power to ratify the purported requisition of 20th June At page 96, Scott, L J observed as follows —

> " In any area of local Government, where the Minister had by his Legislation transferred such powers to the local authority, he for the time being divested himself of those powers, and, out of the extremely wide executive powers, which the primary delegated legislation contained in Reg 51 (1) had conferred on him to be exercised at his discretion, retained only those powers which in his sub-delegated legislation he had expressly or impliedly reserved for himself "

This observation will have to be read in the context of the case, that is, the Minister cannot act in a particular case which he delegated to the Town Clerk. It does not support the view of the learned Counsel that when once there is a delegation, the authority that delegated the power is divested of all its powers. A Bench of this Court in a decision reported in *P Ramiah* v *Chief Secretary*[2], did not accept the view propounded by Scott, L J , but peferred the view expressed by Coleridge, C J , and Wills, J , in *Huth* v *Clarke*[3], and held that merely because a person is authorised by the Government to exercise the power, the Government is not deprived of its powers The notion that the use of the word ' delegate ' implies that the executive committee parted with their own authority is misconceived It was sought to be contended that the view expressed by the Bench is in the nature of *obiter*. But I have no hesitation in respectfully accepting the view expressed by the Bench

The submissions of the learned Counsel that there will be considerable difficulty in the working of this rule is not made out The Regional Transport Authority can deal with the case of cancellation as well as suspension, whereas the Secretary can only deal with the case of suspension Even granting that this provision may lead to some working difficulties, that will not be a ground for holding that the delegation is not valid All the contentions of the learned Counsel fail and all the Writ Petitions except W P. No. 4397 of 1965 are dismissed with costs Counsel's fee Rs 100 in each of the petitions

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1. (1948) 1 All E R 85
2. (1949) 2 M L J 61 A I R. 1950 Mad 100
3. (1890) L.R 25 Q B D 391.

In addition to the points raised in the batch of petitions, in W P No. 4397 of 1965 it was contended that a warning was issued by the Secretary, Regional Transport Authority and that the issue of the warning cannot be sustained as it is not one of the punishments which the Regional Transport Authority's Secretary is empowered to make. The order therefore will have to be set aside as being made without jurisdiction. But the matter will be remitted to the Secretary, Regional Transport Authority, for fresh disposal. He will take the case afresh and dispose it of according to law after supplying all the documents and the information to which the petitioner is entitled to. There will be no order as to costs.

R.M. *All the Petitions except W.P No. 4397 of 1963 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE K. S. VENKATARAMAN.

Maruthamuthu . *Petitioner**

Madras Prohibition Act (X of 1937), section 14—Confiscation of vehicle under—Owner of vehicle having no knowledge of the car being used for the offensive trade—If confiscation could be ordered.

Normally an order of confiscation of a vehicle which is involved in a prohibition offence will be made only if there is reason to believe that the owner of the vehicle knew that it was being used or going to be used for transporting illicit liquor and committing an offence under the Prohibition Act. The fact that the owner of the vehicle has not exercised due care in preventing the commission of the offence is no ground to order confiscation. Section 14 of the Prohibition Act no doubt provides that an order of confiscation shall not be made if the owner of the vehicle satisfies the Court that he had exercised due care in preventing the commission of the prohibition offence But it does not follow that in every case where the owner is not able to so prove, the car should be confiscated even though there is no evidence to prove that the owner had knowledge that a prohibition offence was going to be committed by using his car

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order dated 25th April, 1966 made in Criminal Miscellaneous Petition No 119 of 1966 on the file of the Court of the District Magistrate (J.), South Arcot at Cuddalore (Crl. M P No. 2368 of 1965 on the file of the Court of the Sub-Magistrate, Cuddalore) and direct the return of the Car MSW 8601 to the petitioner herein.

T. S Arunachalam, for Petitioner.

Public Prosecutor, on behalf of State.

The Court made the following

ORDER —This is a petition to set aside the order of confiscation of the Ambassador car belonging to the petitioner. The petitioner is a resident of Thiruvanaikoil near Tiruchirapalli. The car was found on the night of 28th September, 1965 on the Cuddalore-Pondicherry road carrying over 500 bottles of brandy. It was driven by the driver of the petitioner and there were some strangers in it. They were convicted under the Prohibition Act for transport of the brandy. There was an order of confiscation of the car The petitioner applied to the learned trial Magistrate to have the order set aside alleging that his driver took away the car without his knowledge, and during his absence, and that he had no knowledge that illicit brandy was going to be transported in the car His version was that he went away on 26th September, 1965 to inspect his fields and returned only on 1st October, 1965 and he learned from his wife that the driver had taken away the car with her consent In this connection, the petitioner admitted that the car used to be run as an illicit taxi. The suggestion, therefore, is that when the driver took away the car it was probably for using the car as illicit taxi. But even so, there was no evidence that the petitioner or his wife knew that the driver was going to allow the car to be used for transporting illicit brandy.

On these facts, the learned Sub-Magistrate passed an order of confiscation, and that was confirmed by the learned District Magistrate, who proceeded on the foot-

* Crl. Mis. P. No. 1198 of 1966. 27th July, 1966.

ing that the petitioner had not satisfied the Court that he had exercised due care in preventing the commission of a prohibition offence, and that, that not having been proved to the satisfaction of the Court, it was not sufficient for the petitioner to show that he had no knowledge of the offence That is how the learned District Magistrate has interpreted the scope of the proviso to section 14 of the Prohibition Act. I had however occasion to point out in a recent judgment of mine in Criminal Miscellaneous Petition No. 922 of 1966 Mohanlal Shinlote (Petitioner) that this is not the scope of the proviso, and that, while it is true that the order of confiscation shall not be made if the owner satisfies the Court that he had exercised due care in preventing the commission of the prohibition offence, it does not follow that in a case where he is not able to satisfy the Court, the car should be confiscated even though there is no evidence to prove that the owner had knowledge that the prohibition offence was going to be committed by using the car Normally an order of confiscation will be made only if there is reason to believe that the owner knew that the car was going to be used for transporting illicit liquor and committing an offence under the Prohibition Act. Thus it is clear that the learned Sub-Magistrate and the learned District Magistrate have proceeded on an incorrect view of the law. They themselves do not say that the petitioner had knowledge that the car was going to be used for a prohibition offence, and I am not able to find evidence sufficient to fasten the petitioner with such knowledge. Under these circumstances, the order of confiscation is set aside and the car will be returned to the petitioner.

However, I may suggest to the authorities the desirability of enacting a provision in the Prohibition Act similar to the proviso to section 115 of the Customs Act (LII of 1962) Under that provision where a conveyance is used for the carriage of smuggled goods and is normally liable to confiscation under the main provisions of the section, an option shall be given to the owner to pay, in lieu of the confiscation, a fine not exceeding the market price of the goods, which are sought to be smuggled. Such a provision would leave the Court with some discretion to impose a fine suitable to the circumstances of the case, instead of ordering confiscation of the vehicles, which, in a particular case, may be too heavy a punishment.

R M. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Syed Jaffar, Trustee, Hazrath Kuthbisha Durga, Thennur .. *Petitioner**

v.

S. Arumugham alias Singaram and others .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 145 and 147—Procedure under—If similar—If convertible —Essentials for validity of an order under section 145

There seem to be material differences between section 145 and section 147 of the Criminal Procedure Code in that while the duty to pass an order under section 147 is only a discretionary one, section 145 (1) of the Code indicates that the Magistrate shall make an order in writing stating the grounds of his being satisfied. Further unlike section 145 (4), the date of the order under section 147 (1) is not crucial or determinative of the rights of the parties.

Before an order under section 145 could be implemented, there should be a clear and specific order as contemplated in section 145 (1). A mere note by the Magistrate taking the case on file and directing issue of notice is not at all an order contemplated under the sub-section.

Quaere—Can a proceeding under section 145 of the Code be converted and treated as one under section 147 of the Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Revenue Divisional Officer, and Ex-Officio First Class Magistrate, Tiruchirappalli, dated 15th May, 1965 and made in M.C No. 2 of 1965.

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* Crl R P No 1049 of 1965
(Crl.R.C. No. 1034 of 1965.) 28th July, 1966.

Ali Mohammed, for Petitioner

A Nagarajan, for Respondents 1 to 6.

K A Panchapagesan for Public Prosecutor on, behalf of State

The Court made the following

ORDER.—The dispute in this case concerns T S No 351/2, in Tiruchirappalli Town, and is between a Durga represented by its Trustee Syed Jaffar and some Hindu residents of the locality in their capacity as Managers and Trustees of certain Hindu temple In a prior litigation between the Durga and the Hindu residents culminating in the decision of this Court dated 25th August, 1954 in S A No 1032 of 1950, Krishnaswami Nayudu, J , held that the site belonged to the Durga but was subject to the customary right of the Hindus to use portions of the site for certain festivals on certain occasions for certain limited purposes The Trustee of the Durga, however, put in a petition on 14th April, 1965 to the Revenue Divisional Officer, Tiruchirappalli (in his capacity as the Executive First Class Magistrate) quoting sections 149 to 151, Criminal Procedure Code alleging that the Hindus were trying to put up a shed in excess of the customary right. The learned Magistrate passed the following order

"Taken on file under section 145, Criminal Procedure Code and issue notices to both sides for enquiry on 19th April, 1965."

No specific order, however, as required under section 145 (1), Criminal Procedure Code was passed Actually the summonses which were issued to the counter-petitioners in the petition were in Form No 68-(summons in a case instituted on complaint) Statements were put in by the counter-petitioners, and, on perusing the statements of both sides, the learned Magistrate dismissed the petition of the Durga on the ground that the Thennur Village where in the site lay had been taken over by the Government under the provisions of the Madras Estates Abolition Act (XXVI of 1948), that consequently the title no longer vested with the Durga and that it was for the Revenue Department of the Government to take action to evict the counter-petitioners Against that order dated 15th May, 1965 this revision petition was filed by the Trustee of the Durga.

On 14th February, 1966, I passed an order pointing out that the application for patta under the provisions of the Madras Estates Abolition Act which had been put in by the Durga was still pending with the Collector, and that till it was disposed of it was necessary to pass interim orders maintaining the existing rights of the two sides as found by Krishnaswami Naidu, J. Since the parties however, differed on the extent of the respective rights as found by Krishnaswami Naidu, J , I called for a report, and the learned Additional First Class Magistrate, Tiruchirappalli, has submitted a report.

The report shows that the dispute is over a right claimed by the Hindus to put up a shed 20 feet x 10 feet, almost near the entrance to the Durga They claimed that the shed had been existing in that place for over 40 years, all the year round, that during times of festivals additional sheds were put up for increased accommodation and that in the permanent shed some heavier parts of the chariot of the Hindu temples were stored. They alleged that some time before 14th April, 1965 that shed had fallen into disrepair and that they were only trying to renovate the shed and put up a new shed in its place On the other hand, the Durga alleges that there was no such shed at all in that place all the year round, that formerly temporary sheds used to be put up only during times of festivals and that the shed was clearly an innovation The learned Magistrate, on examining the evidence, oral and documentary adduced before him, has accepted the case of the Durga

There can be no doubt that this conclusion is correct on the materials available to the Court at this stage Apart from the reasons given by him, I may point out a very tell-tale circumstance, against the contention of the Hindus, namely that in the earliest written statements filed by them they did not allege that there had been a shed in that place for over 40 years that it has fallen into disrepair and that they were only trying to reconstruct it. It seems to me that, if there was any truth in

this allegation they would normally have made such an allegation. There are also the circumstances pointed out by the learned Magistrate, namely, that in the prior litigation, O.S. No. 55 of 1946, District Munsif's Court, Tiruchirappalli, neither in the plaint, nor in the plan of the Commissioner nor in the Town Survey Field Register was there any reference to the existence of such a permanent shed.

If these were all, this Court would be justified in directing removal of the shed, giving however a reasonable time to the Hindu residents to file a suit and obtain an order of injunction *contra* ordering retention of the shed till the final decision of the dispute in the suit. But unfortunately for the Durga, there is an insurmountable difficulty raised by the Hindus through their learned Counsel, Sri A. Nagarajan. The learned Counsel points out that the foundation for passing any order under section 145, Criminal Procedure Code, is lacking in this case, because of the absence of the order contemplated in section 145 (1), Criminal Procedure Code. I have already pointed out that the only thing which may be called an order is the note of the learned Magistrate taking the case on file under section 145, Criminal Procedure Code, and directing issue of notices. But that is not at all the order which is contemplated under section 145 (1), Criminal Procedure Code. This is clear from a series of decisions of this Court, the last of which is that of Balakrishna Ayyar, J., in *Pakamaraja Naicker* v. *Chidambara Nadar*[1], which has been followed by the Andhra Pradesh High Court in *Kondappa* v. *Ram Rao*[2]. The point is not merely a technical one and is a matter of substance, because under section 145 (1), Criminal Procedure Code, the date of the order under section 145 (1) is crucial, because it is with reference to that date the Court has to decide as to which party was in possession on that date. The second proviso also makes that date crucial because if a party had been dispossessed by force within two months before that date, that party might be treated as in possession on the date of the order.

Sri Ali Mohammed, the learned Counsel for the petitioner-Durga, however, seeks to get over the above difficulty by urging that though the case was taken on file under section 145, Criminal Procedure Code, the dispute raised really fell under section 147, Criminal Procedure Code, and that under section 147, Criminal Procedure Code, it was not essential that the Magistrate should pass any preliminary order. He also cites *Chhuttan* v. *Ali Hussain*[3] in support of the proposition that a proceeding though started under section 145, Criminal Procedure Code, could be converted into one under section 147, Criminal Procedure Code.

There seem to be material differences between section 145 and section 147, Criminal Procedure Code in that section 147 says that the Magistrate *may* make an order in writing stating the grounds of his being satisfied about the likelihood of a breach of the peace, whereas section 145 (1), Criminal Procedure Code, indicates that he *shall make* an order in writing stating the ground of his being so satisfied. Further, unlike section 145 (4), the date of the order in section 147 (1) is not crucial or determinative of the rights of the parties. Section 147 (2), Criminal Procedure Code, says that the relevant date of the determination of the alleged right to user is the institution of the enquiry. If the proceeding could be considered as one under section 147, Criminal Procedure Code, this Court would *prima facie* have jurisdiction to pass an order as the Magistrate could have done directing the Hindus to remove the newly put up shed as indicated in the earlier portion of this judgment. But it is unnecessary to express a final opinion on the question because there is difficulty in converting the proceeding under section 145, Criminal Procedure Code, into one under section 147, Criminal Procedure Code, in this case. It is true that the Durga concedes the temporary right of the Hindus to use the site on the occasions of the festivals and to put up temporary sheds, then. But the right claimed by the Hindus could more appropriately be said to raise a question of possession under section 145, Criminal Procedure Code, because they claim the right

1. (1954) 1 M.L.J. 476 : A.I.R. 1955 Mad. 229.
2. (1964) 1 An. W.R. 24 : A.I.R. 1964 A.P. 168.
3. A.I.R. 1956 All. 452.

to have the shed there all the year round in exercise of their alleged right Virtually it amounts to a claim of possession of that portion of the site It may be that the claim is untenable, but the nature of the claim is relevant for determining whether the proceeding was one which was rightly initiated under section 145, Criminal Procedure Code, or could be taken to have been instituted under section 147, Criminal Procedure Code, from the inception In this view of the matter, I do not think it will be proper or even quite legal to pass an order directing the Hindus to remove the shed

The petition is accordingly dismissed.

In my view, it is open to the Durga to institute a suit for the purpose of preserving their existing rights, pending disposal of the application for patta filed by them before the Collector. But whether such a suit will lie will eventually have to be decided by the Court where the suit may be instituted.

R M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR JUSTICE P S KAILASAM.

K Rangarajan and another .. *Petitioners**

v

State of Madras represented by the Executive Engineer, Public Works Department, Cauveri Division, Tanjore .. *Respondent*

Domestic Tribunal—Disciplinary Proceedings before—Decision of a Criminal Court acquitting an accused of an offence charged—Departmental proceedings in respect of the same incident—Decisions of Court—How far final

It is now well settled that a departmental enquiry against a Government servant can be initiated on the basis of certain facts even though the Government servant has been acquitted in a criminal prosecution on the same facts.

While it is true that a domestic tribunal will normally be bound to treat the decision of a competent Court as final and cannot purport to come to a different conclusion on the same facts, it cannot be said that there is a complete prohibition against such tribunal coming to a different conclusion It is well known that domestic tribunals are not governed by the strict rules of evidence and procedure applicable to regular Courts In fact departmental proceedings might even follow where the acquittal was otherwise than honourable The question whether the principle of natural justice would be violated in not giving due and proper weight to the findings of a criminal Court will depend on the circumstances of each case

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent relating to the suspension order as revealed in the letter No 133 dated 12th January, 1965, issued by him and connected records and quash the same, etc

M S. Venkataram Ayyar and *K S Mahalingam*, for Petitioner

K S Bakthavatsalam for the Additional Government Pleader, on behalf of Respondent

The Court made the following

ORDER.—These three petitions relate to the same matter and can be dealt with together The Writ Petitions are filed for the issue of a writ of *certiorari* calling for the records of the Executive Engineer, Public Works Department, Cauveri Division, Tanjore relating to the suspension order of the petitioners and for quashing the same As the facts are similar in all the three writ petitions, Writ Petition No 3971 of 1965 will be dealt with

The petitioner was working as Head Lascar in Public Works Department, Valangaiman section at Sakkottai. The Executive Engineer, Public Works

* W.P. Nos. 3971, 3972 & 3973 of 1965. 31st August, 1966.

Department, Cauveri Division, by his order No 5015-M dated 30th September, 1964, transferred the petitioner from Valargaiman to Sirkali. This order was served on the petitioner on 2nd October, 1964 The petitioner met the Executive Engineer in person on 3rd October, 1964, and requested him to cancel the orders of transfer and permit him to continue in Valangaiman section itself On 7th November, 1964, there was an incident in which the Section Officer of Valangaiman was assaulted by the petitioner herein and the petitioners in the other two petitions —Writ Petitions No 3972 of 1965 The Section Officer sent a telegram to the Superintending Engineer, and the Superintending Engineer reported the matter to the Chief Engineer on 9th November, 1964 The Superintending Engineer by his order dated 9th November, 1964, placed the petitioners under suspension pending enquiry. The suspension order was forwarded to the Section Officer, Valangaiman on 10th November, 1964 The petitioner was served only on 19th February, 1965, while the petitioners in Writ Petitions Nos 3972 and 3973 of 1965 were served with the suspension order soon after it was made. A criminal complaint was also preferred, and the District Magistrate (J), Kumbakonam acquitted the petitioner herein and the petitioners in Writ Petitions Nos 3972 and 3973 of 1965 on 27th February, 1965 The Department did not revoke the order of suspension, as departmental proceedings were in contemplation under the directions of the Superintending Engineer by his letter dated 18th June, 1965 After the order of acquittal by the District Magistrate, the petitioners applied to the Executive Engineer for cancellation of the order of suspension on 22nd March, 1965 On 24th July, 1965, the petitioners in Writ Petitions Nos. 3971 to 3972 of 1965 addressed a letter to the Chief Engineer praying for cancellation of the order of suspension. The petitioners not having received any reply from the authorities have preferred these Writ Petitions

The main contention in the Writ Petitions is that on identical facts and charges the petitioners were acquitted by the District Magistrate and therefore the Department is not justified in embarking on a fresh enquiry on the same facts On the materials on record I am unable to say that the enquiry contemplated is on the same facts on which the petitioners were tried by the Criminal Court Apart from the order of suspension, no charge memo. has yet been given to the petitioners. Till a charge memo is given it cannot be said on what facts the departmental enquiry is based It is therefore too early to accept the contention of the petitioners that the departmental proceedings are based on the same facts on which the petitioners were acquitted by the District Magistrate It has been held that a finding of a Criminal Court is not always binding on a disciplinary tribunal In this connection the decision of the Supreme Court in *State of Andhra Pradesh* v *Sree Rama Rao*[1] may be referred to In that case the Sub-Magistrate found that one Durgalu, the only eye witness, who spoke to the torture of Reddy Simhachalam, turned hostile and that his evidence could not be accepted In his earlier statement Durgalu stated that he was an eye witness to the torture of Reddy Simhachalam. Durgalu stated before the Sub-Magistrate that he had escaped from the custody before he reached the Police Station on 5th March, 1964, and that he was re-arrested only on 8th March, 1964 The torture of Reddy Simhachalam was on 7th March, 1964. On revision, the learned Sessions Judge declined to accept the evidence of Durgalu that he escaped on 5th March, 1964 In the departmental enquiry against the respondent for misconduct, the Enquiry Officer declined to accept the finding of the Magistrate. In the circumstances the Supreme Court observed as follows at page 1727.

"The Enquiry Officer appears to have stated that the Judgment of the Magistrate holding a Criminal trial against a public servant could not always be regarded as binding in a Departmental enquiry against that public servant In so stating the Enquiry Officer did not commit any error"

In *R P. Kapur* v. *Union of India*[2], the Supreme Court observed as follows (at page 792).

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1 (1964) 1 S C J 364 · (1964) 1 M L J. (S.C.) 120 · (1964) 1 An W R. (S C.) 120 · (1964) M.L.J. (Crl.) 221: A.I.R. 1963 S.C. 1723 (1727).

2. A.I.R. 1964 S.C. 787.

"If the trial of the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, even in case of acquittal proceedings may follow where the acquittal is other than honourable. The usual practice is that where a public servant is being tried on a criminal charge, the Government postpones holding a departmental enquiry and awaits the result of the criminal trial and departmental proceedings follow on the result of the criminal trial."

The two decisions above cited make it clear that it cannot be said that in the case of an acquittal by a criminal Court the departmental proceedings cannot be initiated on the same facts. Even in the case of acquittals the departmental proceedings may follow when the acquittal is 'other than honourable'. As to how far a departmental enquiry is competent, when the Officer is acquitted on the same facts by a criminal Court, is dealt with in *Shaik Kasim* v. *Superintendent of Post Officers*[1], and by a Bench of this Court in *Krishnamurthy* v. *Chief Engineer*[2]. It has been observed in *Jerome De Silva* v. *Regional Transport Authority*[3]:

"As primarily the criminal Court of the land are entrusted with enquiry into offences, it is desirable that the findings and orders of the criminal courts should be treated as conclusive in proceedings before quasi-judicial tribunals."

The Bench in *Krishnamurthy* v. *Chief Engineer*[2], in dealing with the case in *Jerome De Silva* v. *Regional Transport Authority*[3], observed:

"The utmost that can be gathered from *Jerome De Silva's case*[3], cited earlier is that where the charge relates to the identical subject-matter of the criminal trial, and there has been an acquittal on the merits at that trial, it might not be proper for the departmental authority to arrive at some other finding inconsistent with that acquittal."

No doubt it would be a strange predicament, if, in spite of a trial by a criminal Court on the same facts, the domestic tribunal were to come to a different conclusion on the same facts. But there cannot be a complete prohibition against the tribunal coming to a different conclusion, for it is well known that the tribunal is not bound by several rules that are binding on appreciation of evidence by a criminal Court. As for instance, a criminal Court would not accept the evidence of an accomplice, unless corroborated in material particulars, while the departmental enquiry may base its finding on the uncorroborated testimoney of the accomplice. In this connection it is significant to note that the Supreme Court has observed in *R. P. Kapur* v. *Union of India*[4], that the departmental proceedings might follow where the acquittal was 'other than honourable'. The question whether the principles of natural justice had been violated in not giving due and proper weight to the finding of the criminal Court can only depend on the facts of each case. As already observed, it is premature to go into this question, as a chargememo has not yet been given. On this ground these petitions are dismissed. There will be no order as to costs.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Public Prosecutor .. *Appellant**

v.

S. A. Jabbar .. *Respondent.*

Industrial Disputes Act (XIV of 1947), section 34 (1)—Complaint by or under the authority of the appropriate Government—Scope of—Persons authorised by Government—If can authorise some other officer to file the complaint.

Section 34 (1) of the Industrial Disputes Act provides for two alternatives for making a complaint in respect of offences punishable under the Act, *viz.*, a complaint being made by the appropriate Government itself or a complaint made under the authority of the Government. Where there is a written order of the Government authorising the Collector to take proceedings, it is open to the Collector to authorise the Public Prosecutor to file the complaint. Where the terms of the order are wide

1. (1965) 2 M.L.J. 90.
2. (1966) 1 M.L.J. 306.
3. (1952) 1 M.L.J. 35.
4. A.I.R. 1964 S.C. 787 at 792.

* Crl.A. No. 776 of 1964. 2nd September, 1966.

than a specific direction empowering a particular officer to make the complaint, it would certainly cover a case where the officer makes a further delegation.

The words " under the authority of the appropriate Government " in the section really imply a sanction by the Government and much emphasis cannot be laid on the identity of the particular officer who has to make the complaint

(Analogous provisions in section 196 of Criminal Procedure Code and section 20 of Prevention of Food Adulteration Act pointed out)

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) of offences under section 29 of the Industrial Disputes Act by the Additional First Class Magistrate II, Salem in S T R Case No 248 of 1964 on his file.

S. R Srinivasan, for Public Prosecutor

S Ramalingam, for Respondent.

The Court delivered the following

JUDGMENT —This appeal is filed by the State of Madras against the acquittal of the accused in S T.R No 248 of 1964 by the Additional First Class Magistrate No 2, Salem In view of the limited scope of the enquiry before me, which is confined to a specific legal point, and in view of the circumstances that the other facts are admitted, it is sufficient to refer to the facts very briefly The accused Jabbar is the proprietor of Konganapuram Transports, Salem One Palaniappan who was working as a cleaner in the said company was dismissed from service. On the representation made by the Motor Workers Union, the State Government made a reference to the Labour Court at Coimbatore under section 10 of the Industrial Disputes Act, for a determination as to whether the dismissal of Palaniappan by the accused's company was proper The Labour Court passed an award, holding that the dismissal was improper, and directing the reinstatement of Palaniappan Repeated attempts were made first of all by Palaniappan, and then by the Union to have the award relating to reinstatement enforced But the accused failed to comply with it Thereafter the Government was moved to take action and G O Ms No 2008 (Labour) was issued on 6th April, 1964, in the following terms ·

"Whereas the Labour Court, Coimbatore, in its award, dated the 29th August, 1963, published with G O Ms No 4434 (Labour) Industries Labour and Co-operation, dated the 11th September, 1963 at pages 17 to 19 of the Supplement to Part II, section I of the *Fort St George Gazette*, dated the 25th September, 1963, has held that the non-employment of the worker Sri S Palaniappan by the management of Konganapuram Transports, Salem, is not justified and that he is entitled to reinstatement in service with back wages from the date of non-employment, namely, the 17th July, 1962, till he is reinstated in service ,

And whereas Sri S A Jabbar, the Proprietor of the said Konganapuram Transports, has not reinstated the said worker Sri S Palaniappan and has not implemented the said award ,

And whereas, by not implementing the abovesaid award, the said Sri S A Jabbar has committed a breach of the terms of the award and has thereby committed an offence punishable under section 29 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947) ,

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 34 of the said Act, the Governor of Madras hereby directs that a complaint be made against the said Sri S A Jabbar for an offence punishable under section 29 aforesaid

2. The Collector of Salem is requested to take necessary action for the prosecution of Sri S A. Jabbar, who is the proprietor of the said Konganapuram Transports, Salem, and submit a report to the Government in due course "

Thereafter, the Assistant Public Prosecutor, Grade I, Salem, purporting to represent the State, filed a complaint in the lower Court against the accused for contravening section 29 of the Industrial Disputes Act The complaint also alleged that in pursuance of the orders of the Government in the G O cited above, the Collector of Salem had directed the complainant to file the present complaint With the complaint was enclosed a copy of the Government Order and also the order of the Collector dated 30th April, 1964, containing the necessary direction issued to the Assistant Public Prosecutor to file the actual complaint.

The case was fully heard by the learned Magistrate and evidence was taken both for the complainant and the accused Notwithstanding the plea of ' not guilty ' by

the accused, the finding of the learned Magistrate, was that the accused did not implement the terms of the award and consequently his failure to reinstate the worker concerned (P W 2) was certainly an offence under section 29 of the Industrial Disputes Act. This finding of fact by the learned Magistrate is not disputed before me. After going through the evidence I am in agreement with it.

But before the lower Court there was an argument based upon the legality of the complaint filed by the Assistant Public Prosecutor, and whether it involved a strict compliance with the provisions of section 34 (1) of the Industrial Disputes Act, which contains the provisions for taking cognizance of an offence under the Act, in the following terms :

" No Court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, save on complaint made by or under the authority of the appropriate Government. "

The argument for the accused, which is also pressed before me in this appeal, is that the Government Order cited above, authorised only the Collector to file the complaint and further delegation by the Collector to the Assistant Public Prosecutor for filing the complaint, is illegal, as not being in compliance with the provisions of section 34 (1) of the Act Section 34 (1) visualises two situations : (1) The complaint being made by the appropriate Government and (2) the complaint being under the authority of the appropriate Government It will be useful to compare this provision with analogous provisions in other enactments Thus in section 196 of the Code of Criminal Procedure, where the pre-requisite for taking cognizance of certain offences specified in that section, is a complaint (1) made by the order of the State Government, or (2) under authority from the State Government, or (3) by some officer empowered by the State Government in this behalf Section 20 of the Prevention of Food Adulteration Act provides, as a pre-requisite for a prosecution for an offence under that Act, that the prosecution should be instituted by or with the written consent of the State Government (or Central Government), or a local authority or a person authorised in this behalf by the State Government (or Central Government) or a local authority The third alternative in section 196, Criminal Procedure Code of an " officer empowered by the State Government" came for consideration in the decision of this Court in *State G S S I* v *P Ramaswami*[1]. In that case the Government Order sanctioning the prosecution of the Editor of a paper for an offence under section 295-A, Indian Penal Code directed the Commissioner of Police, Madras, to depute a suitable Officer to make the complaint Thereupon, the Commissioner of Police deputed a Sub-Inspector for the purpose, first of all to make an investigation, and later on by a fresh authorisation to prefer a complaint Learned Counsel appearing for the accused respondent before me stated, that the Government Order in the present case authorised only the Collector of Salem to make the complaint, but it did not permit him to make a further delegation to a lower authority to act on his behalf, when as by way of contrast, in the Government Order referred to in the decision just cited, the authorised Officer namely, the Commissioner of Police, was also permitted to depute a suitable Officer to make the actual complaint. But there appears to be a difference between the terms of the delegation in the Government Order referred to in the decision cited above, and those in the Government Order in the present case The terms of authorisation in the present case are: " The Collector of Salem is requested to take necessary action for the prosecution " The words " to take necessary action for the prosecution " are different from a specific direction to the Collector to prefer a complaint. These words used in the Government Order in the present case, are wide enough to include a power in the Collector to authorise a subordinate Officer also to make the complaint on his behalf The third limb of section 196, Criminal Procedure Code refers to an officer empowered by the State Government for preferring the complaint. But such a provision is absent in section 34 (1) of the Industrial Disputes Act, which provides only for two alternatives, namely a compliant being made by the appropriate Government, or a complaint being made under the authority of the said Government.

1. 1963 M.L.J. (Crl.) 68: (1963) I M.L.J. 15.

The words "under the authority of the appropriate Government" which are found both in section 34 (1) of the Industrial Disputes Act as well as in section 196 of the Code of Criminal Procedure have come in for interpretation in the two well-known cases *Queen Empress* v *Bal Gangadhar Tilak*[1], which was quoted and followed with approval by the Calcutta in *Apuruba Krishna Bose* v *Emperor*[2], —*Bande Mataram case* At page 149 of the Calcutta decision, after referring to the earlier Bombay decision, the learned Judge observed :

"But the real question in such a case is whether the prosecution was instituted under the authority of Government To quote the judgment of the Full Bench *Queen Empress* v *Bal Gangadhar Tilak*[1] 'There is no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the Officer who puts the law in motion In this case the proseuction was conducted by the Government Solicitor It was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint ' The prosecution of the petitioner was, *mutatis mutandis* even more regular than the prosecution of Tilak "

In the present case, we have to interpret only the phrase "under the authority of the appropriate Government" found in section 34 (1) of the Industrial Disputes Act The Government Order in question provides the necessary authority, but it does not designate the Collector as the Officer to make the complaint in actuality. It designates the Collector as the person to take steps for the prosecution, and those terms are wider than a specific direction empowering a particular officer to make the complaint, and they would certainly cover a case where the Collector makes a further delegation, as in this case, to the Assistant Public Prosecutor.

The learned Public Prosecutor has drawn my attention to the decision of the Supreme Court in *State of Bombay* v *Parashottam Kanaiyalal*[3], which interprets the provisions of section 20 of the Prevention of Food Adulteration Act, which I have referred to earlier After referring to the words "written consent" found in the first part of section 20 (1) of the Act, their Lordships observe that the emphasis at that stage was on the consent to the filing of the prosecution and not to the person filing it. "The preliminary examination of the facts to ascertain the desirability and propriety of the prosecution is in this last case, the responsibilty of the person or authority giving the written consent—not of the person who figures as the complainant" But the relevant provision of section 34 (1) is somewhat different, and bears a closer analogy to the second limb of section 196 of the Code of Criminal Procedure, which refers to the "authority from the State Government" These words really imply a sanction by the Government after the Government has considered the desirability of prosecution Not much emphasis is laid in the said provision, on the identity of the Officer who has to make the complaint. It is presumably for the reason that the Government Order in this case, was couched is somewhat wide terms, giving the Collector, a latitude to take necessary action for the prosecution without specifying that the Collector was the person to file the criminal complaint

For the aforesaid reasons, I am of the opinion that the prosecution in this case has been properly and legally instituted I allow the appeal, set aside the acquittal of the accused and convict him under section 29 of the Industrial Disputes Act He is sentenced to pay a fine of Rs 250 with S I for one month in default The employee (P W 2) in his evidence states that he was getting Rs. 60 per month at the time of his dismissal I direct that out of the fine amount if collected Rs 180 will be paid to him as compensation. Time for payment of the fine amount is three weeks from this date

R M. *Appeal allowed*.

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1. I L R 22 Bom 112
2. I.L R. 35 Cal 141.
3. (1961) 1 S.C.J. 226 ; (1961) 1 M.L J. (S C) 59 ; (1961) 1 An W R (S C) 59 1961 M L J (Crl) 146 ; A.I.R. 1961 S C. 1.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M ANANTANARAYANAN, *Chief Justice*, MR JUSTICE T. VENKATADRI AND MR JUSTICE P. RAMAKRISHNAN

Jayaraj Anthony .. *Petitioner**

v.

Mary Seeni Ammal .. *Respondent*

Divorce Act (IV of 1869), section 19 (1)—Impotency as a ground of nullity—Nature of proof—Refusal to allow access or consummate—Impotency—If can be inferred.

'Impotence' in its legal sense is an incapacity to consummate the marriage and it may be physical or psychological But the mere fact that the spouse felt that she had no charm in married life or was inclined to lead a religious life and consequently wilfully refused to allow sexual access to the husband cannot lead to any inference that she was impotent Under the section the proof required is that she was impotent at the time of the marriage and continued to be so till the time of the proceedings (Procedure to be followed in cases where the party complained against refuses to attend Court or take part in the proceedings, indicated)

Case referred by the District Judge of Tirunelveli for confirmation by the High Court under section 18 of the Indian Divorce Act of 1869, of the Decree *Nisi* dated 30th January, 1966 and passed in O S No 19 of 1964 on his file.

G Ramalinga Reddy, for Petitioner.

M A Srinivasan, for Respondent as *amicus curiae*

The Judgment of the Court was delivered by

M Anantanarayanan, C J—This is a reference made by the learned District Judge of Tirunelveli under section 18 of the Indian Divorce Act (IV of 1869) in a petition by the husband (Jayaraj Anthony) for a declaration of nullity in respect of the marriage between him and his wife (Mary Seeni Ammal) on the substantive ground that the wife (respondent) declined all access to the husband subsequent to the marriage, refused to consummate the marriage, and hence must be regarded as 'impotent' both at the time of the marriage and at the time of the proceeding. The learned District Judge accepted the evidence for the plaintiff and granted a decree in the usual form, subject to our confirmation

Under section 19 (1) of the Act IV of 1869, one of the grounds on which the petition for a decree of nullity, in respect of a marriage, could be successfully maintained is that the respondent was impotent at the time of the marriage, and at the time of the institution of the suit This is what the husband alleged, and we have got to see whether there is evidence which the Court can accept in proof of this averment which is the foundation of the petition for nullity

When the matter came up before us at the first hearing, we were so dissatisfied with the state of the record that we instructed the learned Counsel appearing *amicus curiae* for the wife-respondent to get into touch with her and to obtain instructions including the instruction whether she would be willing to submit herself to a medical examination The learned Counsel appearing as *amicus curiae* reports that he has been unable to get into touch with the respondent, and that she has declined service of a letter sent through registered post to her address The respondent-wife never appeared before the learned District Judge of Tirunelveli and did not in any way meet the main allegation As far as the petitioner (plaintiff) is concerned, the record, as we stated earlier, is sadly inadequate and imperfect All that is clear from the record, including the letters filed, is that the marriage was actually never consummated The husband as P W 1 states that during the time that the wife stayed with him, 'she refused sexual intercourse and began to quarrel with me' the seems to have stayed with her husband over some period, but she never allowed cohabitation, according to P W 1 That is corroborated, in the circumstantial sense, by the father P W 3 concerning what the son (plaintiff) told him One Amirthamani (P W 4) also gives evidence, and it is extremely vague. The wife is supposed to have told P W 4 that she had no charm for matrimonial living and the President of the Panchayat (P W. 5) states that the wife told him categorically

* M.C No 1 of 1965 12th August, 1966.

that she had no taste for marriage, and should be permitted to follow her own course in life. We might add that, apparently, she was inclined to a religious life.

On this material, we have anxiously considered whether the requirement of the law can be held satisfied by us. We have come to the conclusion that, emphatically that is not the case, and that the suit would have to be remanded for further trial and fresh finding, before the husband, can hope to succeed. We shall first record, briefly, our reasons for this view, and then proceed to give suitable directions in the matter of remand.

As the outset itself we may observe that it is noticeable that the Divorce Act IV of 1869 does not include, in section 19, any such ground as 'wilful refusal' on the part of the wife to allow to sexual access or the consummation of the marriage. Such a ground of relief was introduced in the United Kingdom under Matrimonial Causes Act, 1937 and the Matrimonial Causes Act, 1950 (see Tolstoy on Divorce, Fourth Edition, page 109). Even so, as this author points out, impotence on the part of the wife was considered to be a sufficient ground for declaring the marriage void prior to these amendments. But that 'impotence' will have to be understood in the proper legal perspective.

It is ordinarily described or defined as an incapacity to consummate the marriage, which may be physical or psychological. In the present case, since impotence is alleged with regard to the wife, if it is physical or psychological evidence will certainly be necessary, particularly in the form of expert medical testimony. Courts have had no hesitation in declaring a marriage void, for instance, where there was an incurable physiological defect in the wife, or for reasons of biological immaturity, the marriage could not be consummated. Even where there was a curable physical defect, divorce has been granted, in cases where the wife declined to have the defect cured. But present is a far different case of a refusal to consummate, which, at the highest, can be put only upon the psychological level. There is such a thing as sexual potency in general, and impotency with regard to a particular spouse, described in the books as impotency *quoad hunc or quoad hanc*. We simply do not know whether the present case is a case of that kind. It may be so in the circumstances. But the mere fact that the spouse felt that there was no charm in marriage, or that she expressed an inclination to a religious life, is not at all conclusive on that aspect. Simply, it does not prove that the wife was impotent at the time of the marriage and that she continued impotent till the time of the petition.

Under these circumstances, and in this state of the record, we are unable to confirm the decree granted by the learned District Judge. The decree will be set aside and the original petition remanded for further trial, in the light of the following directions.

The wife has never attended Court in these proceedings, nor submitted any pleading, nor offered testimony. But she is an essential party and, in matrimonial jurisdiction the presence of both spouses at the hearing may well be imperative in the interests of justice. Hence, we consider that the wife should be summoned to Court to give evidence, and if she does not appear, that steps should be taken to compel her appearance and examination by the Court. The Court must then record whether she admits the averments of the husband and corroborates his version of a continuing and persistent denial on her part to allow consummation of marriage, or does not do so. The wife must also be specifically asked why if she did not allow consummation, she adopted that course, and whether she is willing to submit to a medical examination. If she declines to do so, her refusal should be recorded and the entire matter should be further considered by the Court in the light of the evidence subsequent to the remand, as well as the previous evidence. The Court may then proceed to dispose of the matter according to law, and, if the provisional decree is granted, the matter will come up before us by way of reference. If the petition is dismissed, it is equally open to the aggrieved party to come up here by way of appeal. No order as to costs.

R.M. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE M NATESAN.

Boolagasundaram Pillai . *Appellant**

v.

Appathurai Pillai and others .. *Respondents.*

Madras Public Health Act (III of 1939), sections 39, 40 (2) and 42—Powers conferred on health authority under—Exercise of—Scope—Latrine amounting to nuisance—Municipality if can order pulling down of the structure itself

Specific Relief Act (I of 1877), section 55—Mandatory injunction as between tenants-in-common—If can be issued

The Madras Public Health Act gives the health authority powers for suppression of nuisance or conditions interfering with public health and these powers may be justified as restriant on the use and enjoyment of property in the interests of the general public provided they are exercised reasonably. The authority without deciding whether there is a nuisance could not give directions as to how it has to be abated and it must be deemed to be exercising quasi-judicial powers in that determination *ex parte* determination without reference and notice to the persons affected can have no finality and are open to question A mere declaration by a local authority that a thing is a nuisance will not make it so and the assertion when challenged must be established The Court can always examine the legalty or validity of the notice issued by the authority and if the notice is *ultra vires* it need not be complied with

Section 39 of the Madras Public Health Act does not provide for demolition of the latrine Under that section if the sanitary conveniences provided in a building intended for human habitation is insufficient or inefficient or otherwise objectionable on sanitary grounds the authority can direct the provision of additional sanitary convenience and in such positions as may be specified The authority may also direct structural or other alterations It is only under section 40 (2) in respect of a latrine opening on any public street the health officer may by notice in writing require the owner to remove it or carryout such improvements therein within the time specified Section 42 is its the empowering section for abatement of nuisance Here also the requirement can only be to abate the nuisance and execute such works and take such steps as may be necessary for that purpose None of these sections, however, justify the requiring of th pulling down of the walls or the demolition of the latrine itself on the ground of nuisance The removal of a latrine does not necessarily involve destruction or pulling own of the structure itself The construction as such could be put to some other use

In the instant case the action of the appellant cone of the three tenants-in-common of a latrine in their common enjoyment) in demolishing the later ine on the pretext of a notice for its removal on the ground of nuisance, from the municipality issued at his instance, was high handed, deliberately hasty and was intended to show a *fait accompli* and therefore lacked *bona fides* Hence the lower Courts were right in granting a mandatory injunction in favour of the other tenants-in-common for the restoration of the demolished latrine

Though injunctions are but rarely granted to restrain a tenant-in-common from exercising control over the joint property, a mandatory injunction may be granted where, as in the instant case, there is malicious and wanton destruction of the common estate by one of them with a view to prevent its enjoyment and accustomed user by the other tenants-in-common

Appeal against the Decree of the Subordinate Judge, Tiruchirappalli, dated 24th January, 1962, in Appeal Suit No. 358 of 1961, preferred against the Decree of the District Munsif of Tiruchirappalli in Original Suit No 57 of 1960

A V Narayanaswami Ayyar, for Appellant.

M. S. Venkatarama Ayyar for *V Krishnan* and *P. Veeraraghavan*, for Respondents.

The Court delivered the following

JUDGMENT —This Second Appeal has been preferred by the first defendant in a suit against whom the Courts below have concurred in granting relief to the plaintiffs for restoration by the first defendant of a latrine which the first defendant removed. The injunction granted is a mandatory one for the construction of the latrine at its original place. A brief narration of the facts of the case and the proceedings leading up to the second appeal are necessary for the appreciation of the interesting question raised on behalf of the appellant, the first defendant in the case

The first defendant and the first and second plaintiffs are now owners of adjoining. houses. Originally the property was owned by their family and had a single door No. 73-A, in the occupation of the first plaintiff, the father of the second

* S.A. No. 261 of 1963. 9th April, 1965.

plaintiff and the father of the first defendant The property is situated within the municipal limits of Tiruchirappalli and north of the residential portion is a private lane belonging to the family In this lane, at the eastern extremity, there had been a latrine for the use and enjoyment of the family. The first defendant's father divided himself off from his brothers under Exhibit A-1 in 1917 and later the first plaintiff and the second plaintiff's father, got separated under the partition deed Exhibit A-3, dated 9th September, 1926. Under these partitions the first defendant became entitled to door No 3, the first plaintiff to door No 4, and the second plaintiff, to door No 5. The latrine above referred to which had been in existence prior to the partition was enjoyed by the sharers in common, the first defendant having one-third share therein and the plaintiffs, the remaining two-third share as between themselves. Exhibit A-3 refers to the rights of the first plaintiff and second plaintiff's father, each to a one-third right to the latrine in question. It is the finding of the Courts below that till 14th August, 1959, this latrine had been in the common enjoyment of the three owners of door Nos. 3, 4 and 5 above referred to, the lane being kept in common, that is, the parties are tenants-in-common of the lane and latrine and the same is for the benefit of the use of the three tenants-in-common. While thus the latrine had been serving the need of the three houses, the first defendant appears to have moved the Tiruchirappalli Municipality for the removal of the suit latrine on the ground that its existence was a nuisance. He had not apprised his tenants-in-common, the plaintiffs, of this move of his. On 15th August, 1959, the first defendant started pulling down the suit latrine at about 6 A M, despite the protest of the plaintiffs on the pretext of a notice issued by the municipality As found by the Courts below, the first defendant appears to have manoeuvred to get himself served with the notice in question before 6 A M on 15th August, 1959, and a similar notice Exhibit B-2 was served on the first plaintiff only at 9 A M Meanwhile the first defendant who it is clear has made the notice a pretext had brought about a *fait accompli* destroying the latrine by pulling down the two walls in the south and west. As per the commissioner's report, it appears to be an open and with not too high walls on the south and west with the compound walls with north and east enclosing it. The plaintiffs sent notice to the first defendant claiming its restoration They also issued a notice to the Tiruchirapalli Municipality for cancellation of the notice Exhibit B-2 which they issued in the matter The plaintiffs suddenly and without adequate notice deprived of an essential amenity and thrown on the indulgence of the owner of the adjoining house door No 6 for the use of his latrine, came forward with this suit claiming relief against the first defendant, the present appellant, for restoration of the latrine. The Tiruchirappalli Municipality by its executive authority the Commissioner, was impleaded as the second defendant. The Courts below, on an examination of the notice Exhibit B-2 which purports to be under sections 39, 42 and 134 of the Madras Public Health Act III of 1939, the relevant provisions of the Act in question, and the available evidence on record, held that the order for the removal of the latrine was illegal. It has been held that there is no necessity for the plaintiffs to seek cancellation of the order specifically Finding that the appellant was not justified in demolishing the suit latrine without the consent of his co-tenants, mandatory injunction was granted as prayed for The municipality had raised a special plea as to the maintainability of the suit in the absence of sanction under section 142 of Madras Act III of 1939 While the trial Court held that in the circumstances the section was not a bar to the suit, on an independent appeal by the municipality, Appeal No. 358 of 1961, the learned Subordinate Judge upheld the plea of the municipality that the said section was a bar and dismissed the suit as against the municipality. The appeal by the first defendant against the decree for injunction against him in which as may be expected he had impleaded the municipality also as a party respondent, was dismissed.

The principal point urged by Mr A. V Narayanaswami Iyer appearing for the appellant is that, as the suit has been dismissed as against the municipality the decree for mandatory injunction against the first defendant also cannot be maintained. Learned Counsel seeks to sustain this contention on several grounds. It

is contended that the appellant's act of demolition is in obedience to the order of a statutory authority The act has, therefore, legal sanction behind it and failure to obey the order could be visited with penalty by the municipality. Learned Counsel submits that even assuming that the appellant had made the notice by the municipality a pretext for his action, still as the notice by the municipality stands, the suit against the municipality having been dismissed restoration of the latrine would violate the notice which has become final It is urged that even though the Court might have held that the notice was illegal and *ultra vires*, the municipality is not bound by the findings in the suit, which as against the municipality has been dismissed In any event, it is contended, there is likelihood of his being subject to penal consequences, if the latrine is restored by him there having been no final adjudication of the invalidity of the notice binding on the municipality. In such circumstances it is submitted that the Court would not grant the discretionary relief of injunction It is also contended that the parties being tenants-in-common relief by way of mandatory injunction is not an appropriate relief and at the most the plaintiffs can claim and ought to be given only damages, and this they had not claimed

Let me examine the contention that there was a legal sanction for his act and he was obeying the order of a statutory authority. Admittedly the notice by the municipality has been issued at the instance of the appellant. He had sent the petition to the municipality complaining that the latrine in question was a nuisance. The notice issued by the appellant has not been exhibited The lower appellate Court rightly remarks, on the absence of evidence of the authority which inspected the latrine to prove that the latrine was a nuisance to the public The latrine in question had been in existence for over 45 years serving the needs of the three houses in question No doubt as stated this latrine is in the proximity of the appellant's property at the extreme and of the common lane and the occupants of door Nos. 4 and 5 have to walk to it over the common lane in front of the appellant's house. It appears that the first defendant had put up a latrine for himself in his own house and his intention is clear that the occupants of door Nos 4 and 5 belonging to the plaintiffs should not come and use the latrine just in front of his property. No doubt the Commissioner appointed in this case has noticed that the latrine is away a little bit from the residential quarters of the three houses He has reported that considering the situation, size and surrounding of the suit latrine which when he inspected had been pulled down and that of the three houses it appeared to him that the demolished latrine would serve the needs of the inmates of the three houses in convenient and comfortable manner No doubt the learned Commissioner does not say whether it would be a nuisance or otherwise.

The notice, Exhibit B-2, purported to have been issued under sections 39, 42 and 134 of the Madras Public Health Act runs thus ·

"As the existing latrine in your building No 4 of Narasu Pillai Lane, Division No 8, is causing inconvenience and nuisance to the general public, you should execute the undermentioned work within 15 days of the receipt of this notice

You should construct separate latrine for each house according to Rules of Hygiene

You should remove the common latrine now existing

In default prosecution will be launched against you under section 134 of the Act"

Now, to take up the relevant sections of the Act, section 39 is under Chapter V of the Act headed *Sanitary Conveniences* It reads

"39 (1) If any building intended for human habitation is without any sanitary convenience or if, in the opinion of the Health Officer, the sanitary convenience or conveniences provided therein are insufficient, having regard to the number of persons occupying the building, or are inefficient, or are objectionable on sanitary grounds, he may, by notice in writing require the owner of such building—

(*a*) to provide such santiatry conveniences or such additional sanitary conveniences and in such positions, as may be spcified in the notice "

Section 40 providing for mode of construction of latrines, runs :

"40 (1) All latrines shall—

(*a*) be so constructed as to screen persons using the same and the filth from the view of persons passing by or residing in the neighbourhood, and

(*b*) be maintained, repaired, altered and used in accordance with the rules and by-laws made under this Act

(2) If any latrine opening on any street, whether such latrine be erected before or after the commencement of this Act, is so placed or constructed as to be a nuisance or offensive to public decency, the Health Officer may, by notice in writing, require the owner to remove it or to carry out such improvements therein and within such time as may be specified in the notice

(3) When any latrine is used in common by the occupiers of two or more premises or by the members of two or more families, no person shall injure or improperly foul any such latrine or anything used in connection there with"

Other relevant sections are found under Chapter VI headed *Abatement of Nuisances* Section 41 defines nuisance and under clause (2) a latrine which is so foul or in such a state as to be prejudicial to health or a nuisance will be nuisance under that Chapter Section 42 provides for detection of nuisance by inspection from time to time with a view to ascertain what nuisances exist and calling for abatement of the nuisance under the powers conferred under that Act It also provides that the authority shall enforce the provisions of the Act in order to abate such nuisance Section 43 enables any person aggrieved by a nuisance in any local area to give information of the same to the Health Officer or any other officer for the public health establishment of the local authority Section 44 is another relevant section which runs

"If the Health Officer is satisfied, whether upon information given under section 43 or otherwise of the existence of a nuisance, he may, by notice require the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, the owner or occupier of the premises on which the nuisance arise or continues, to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose

Provided that—

(*a*) where the nuisance arises from any defect of a structural character, the notice shall be served on the owner of the premises, and

(*b*) where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default or sufference of the owner or the occupier of the premises, the Health Officer may himself forthwith do what he considers necessary to abate the nuisance and to prevent a recurrence thereof"

Penalties are provided for contravention of orders, and under section 136 the decision of the Health Officer against which an appeal is not otherwise provided for shall be subject to such appeal as may be prescribed

Now, with reference to the notice Exhibit B-2, it will be seen that section 39 does not provide for demolition of the latrine If the sanitary convenience provided is insufficient or inefficient or otherwise objectionable on sanitary grounds, the authority can direct the provisions of additional sanitary convenience and in such positions as may be specified The authority may also direct structural or other alterations The notice in question does not show that the latrine was insufficient or inefficient or objectionable on other sanitary grounds The need for construction of separate latrine and removal of the common latrine is stated to be its causing inconvenience and nuisance to the general public As already stated and pointed out by the Courts below, it is at the extreme end of a blind private lane The latrine in question does not come under section 40 (2) not being so placed or constructed as to be a nuisance or offensive to public decency having an opening on a public street. It is only under section 40 (2) in respect of a latrine opening on any street, the health officer may by notice in writing require the owner to remove it or carry out such improvements therein within the time specified Section 42 is the empowering section for abatement of nuisance. Here also the requirement can only be to abate the nuisance and execute such works and take such steps as may be necessary for that purpose. The authorities cannot ask in the circumstances of the present case a demolition of the walls in question which the appellant has carried out.

The construction in question is on private property. The Act gives the health authority powers for suppression of nuisance or conditions interfering with public

health and these powers may be justified as restraint in the use and enjoyment of property in the interests of the general public, provided they are exercised reasonably The authority, without deciding whether there is a nuisance, could not give directions as to how it has to be abated and it must be deemed to be exercising quasi-judicial powers in that determination *Ex parte* determination without reference and notice to the persons affected can have no finality and are open to question. A mere declaration by a local authority that a thing is a nuisance will not make it so and the assertion when challenged must be established. The Court can always examine the legality or validity of the notice issued by the authority, and if the notice is *ultra vires* it need not be complied with-*vide* The Law of Municipal Corporations in British India by P Doraisami Ayyanger, Second Edition, pages 474 and 476 and *Sayad Jafir Saheb* v. *Sayad Kadir Rahiman*[1], and In re *Khimji Jairam*[2].

The appellant who seeks umbrage under the notices by the municipality must establish the validity of them *Ex facie* they cannot be maintained They have been issued without any reference to the plaintiffs and need according to the Courts below is not apparent The plaintiffs are entitled to challenge the same and it may get established that there was no case for the action required or, that the abatement as directed and steps ordered, are beyond the limits of what was reasonably necessary in the circumstances If in fact the municipality could not have issued these notices in the circumstances, the appellant cannot rely upon the same for legalising his action. This is apart from the other considerations that will be adverted to presently which are sufficient for disposal of this appeal

For one thing assuming that the latrine as such is a nuisance, there is no need to pull down the walls The structure as such is not stated to be a nuisance It is common property in the common enjoyment of the three tenants-in-common. The removal of the latrine does not necessarily involve destruction or pulling down of the walls. The construction as such could have been put to some other use, or the parties if feasible may remodel it to conform to requirements of sanitation. What we are now concerned with in this case is whether the appellant was justified in pulling down the two walls in question. In this connection reference may be made to a decision of this Court in *Rama Row* v *Martha Sequeira*[3]. In that case the defendant began the construction of a latrine on his premises in compliance with the direction of the municipality, which had approved the site of the latrine. The plaintiff, a neighbouring house owner, sued for injunction restraining the defendant from putting up a latrine on the spot in question It was found that the latrine would be a great nuisance to the plaintiff and that the defendant could construct a latrine in another portion of his premises so as to avoid injury to the plaintiff With reference to the injunction granted by the Courts below for removal of the building itself, this Court observed :

> " All that the plaintiff can complain against is the use of the building as a latrine, for that alone constitutes the nuisance She has no right to object to the building itself, which can be utilized for other purposes which would not cause any nuisance nor injure the inmates of her house She was not justified in coming to Court with a prayer for the removal of the building To that extent the decree must be modified and, as we understand that the walls have been pulled down, she should be directed to restore the building at her own expense "

In the present case even assuming that there is a valid direction by the municipality for the removal of the latrine, that does not requie the pulling down of the walls of the latrine and demolishing it. Even if such a direction had been given, it would be *ultra vires* of the municipality under the provisions invoked and would be open to challenge. It is plain, therefore, that the appellant cannot rely upon the the municipal notice to justify his high-handed action in pulling down the walls and leaving the enclosure open.

The next aspect of the matter is this The municipal notice had given fifteen days' time for execution of the work It will be open to the parties affected to prefer an appeal and establish that there was no nuisance in fact. They can also show

1. (1888) I L R 12 Bom 634.
2. (1899) I L.R. 24 Bom. 75.
3. (1919) I.L.R. 42 Mad. 796, 797 . 37 M L.J. 224.

that the requirements are *ultra vires* of the powers of the Municipality If the Municipality persists in its view the affected party can move the civil Court for necessary relief following the procedure prescribed by law If the affected party is so advised and if he is confident of his position he may defy the notice and plead *ultra vires* of the requirements in any action that may be taken by the municipality. But conscious evidently of the steps open to the plaintiffs to ward at the threatened removal of the latrine, the appellant pulled down the structure at 6 A M Notice in question is served on the plaintiff only at 9 A M Somehow the appellant has managed to get himself served in advance to make a pretext of the notice There is absolutely no necessity or need to pull down the structure immediately on receipt of the notice, when it is open to the party to contest the validity of the notice. At any rate the plaintiffs have at least fifteen days time to take necessary action. It follows, therefore, that when the structure was pulled down the first defendant had absolutely no justification His action lacked *bona fides* In the circumstances the dismissal of the suit as against the municipality is, in my opinion, no bar to the grant of relief against the first defendant for restoration of the structure to its original position. There can be no contravention of any valid order of the municipality by restoration of the *status quo* in respect of the building in question It has not been argued before me that for restoring these old walls to the former position any sanction of the municipality as such would be required

Learned Counsel for the appellant contends that injunction, particularly mandatory injunction, is a matter of discretion and this is not a case in which the exercise of the discretion in favour of the plaintiffs is called for For one thing the Courts below have exercised their discretion and granted the injunction. The question for consideration will, therefore, be whether they had jurisdiction to grant an injunction in the matter or whether the exercise of the discretion has contravened any established principles The appellant who pleads against the grant of equitable relief cannot point out any conduct or act on the part of the plaintiffs disentitling them to the grant of injunction On the contrary, his action has been high-handed, deliberately hasty, and intended to show a *fait accompli*. Such a conduct, in my view if law permits, requires the issue of mandatory injunction directing the guilty party to restore the structure to its original position. If the plaintiffs had had time to approach a Court of law before the walls were pulled down I am certain that the Court would have granted the plaintiffs interim relief. The appellant foiled them by proceeding to destory the structure early in the morning in spite of the protest even before the plaintiffs were served with notice by the municipality He is a tenant-in-common with the plaintiffs and had no exclusive right or possession in the structure The property was used jointly by all the three tenants in question. The following observations of Lord Selborne, L C , in *Goodson* v. *Richardson*[1], are very instructive as to when discretion should be exercised :

> "Now, it is undoubtedly true that where a legal remedy exists, this Court, in determining whether it will leave the parties to that legal remedy or will interfere by way of injunction, has regard to the circumstances of each particular case, and amongst those circumstances are, no doubt, the time at which the work was executed, and also what will be the result to the parties of the interference of the Court, on the one hand, or of leaving them to their legal rights and liabilities, on the other hand But I apprehend that the Court has nowhere said that when a trespass of this kind has been committed under circumstances at all similar to those in the present case, the mere fact of the trespass being complete at the time when the bill was filed will prevent an injunction against the continuance of the trespass".

Learned Counsel for the appellant next contended that the parties being tenants in-common injunction is rarely issued as appropriate relief between tenants-in-common. Reference is made to the decision in *Lachmeswar Singh* v. *Manowar Hossein*[2] where the Judicial Committee has observed that joint property being used consistently with the continuance of joint ownership and possession, without exclusion of the co-sharers and who did not join in the work, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit. But the present is a case where the plaintiffs are deprived of their accustomed use and

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1. (1874) 9 Ch App 221, 223. (P.C.).
2. (1891) I.L.R. 19 Cal. 253 : L.R. 19 I.A. 48

enjoyment of the property by the destruction of the subject-matter held in joint tenancy In *co-tenancy and partition* by Freeman, Second Edition, at page 413, after observing that injunctions are but rarely granted to restrain a co-tenant from exercising control over the joint property, it is observed

"To authorise an injunction, it must appear either that the defendant is *insolvent*, and will therefore be unable to indemnify the complaining co-tenant, or that the act sought to be enjoined will effect a partial or entire destruction of the estate A Court of equity will not interpose to stay waste unless it be of a malicious character or of so unsual and unreasonable a nature as to savour of a wanton destruction of the estate "

At page 684 of the same book it is stated thus ·

" An injunction may, in some instances be granted on the application of one co-tenant to restrain another from committing or continuing some act destructive to the common estate "

The act of the appellant in this case in the circumstances in which he pulled down the walls in question it goes without saying is malicious and wanton Here is a destruction of the common estate with a view to prevent its enjoyment and accustomed user by the other tenants-in-common Reference was made by learned Counsel to a decision of this Court in *Venkatarama Sastri* v *Venkatanarasayya*[1]. It is suggested that only when there was interference with the rights to water or such similar privileges the Court will grant relief by way of injunction I fail to see any help for the appellant from that decision In that case several co-sharers of an agraharam were entitled to the water of a tank in the same proportion in which they owned land in the agaraharam One of the co-sharers used the water of the tank to convert some of his dry lands into wet lands contrary to the customary user of the water of the tank and thereby caused damage to the other co-sharers This Court observed that the other co-sharers can get not only damage but also injunction to restrain the user. The view of the lower appellate Court that if a joint owner of a tank felt aggrieved his remedy was a suit for partition on the analogy of the joint ownership of the land, was held to be too absurd an argument to merit serious notice. Learned Counsel for the respondents drew my attention to some of the cases where in respect of party walls injunction had been granted as between the tenants-in-common of the walls. They cannot be of much assistance to this case. In *Asutosh Roy* v *Rampen Boalia Municipality*[2], the plaintiff and the defendant municipality were in joint possession of a certain piece of land The municipality conceived the idea of constructing houses for accommodation of sweepers and in spite of the protest by the plaintiff as amounting to nuisance to the neighbourhood it proceeded with the work. The aggrived plaintiff filed the suit claiming permanent injunction against the municipality from erecting the proposed huts and latrines as adjunct thereto for the accommodation of the sweepers and *methers.* An *ad interim* injunction granted was dissolved and the Municipality proceeded and constructed the houses and latrines pending the suit. While the trial Court limited the injunction to the removal of the latrines only, on appeal the municipality was directed to remove all the buildings and restore the land to its original condition. Setting out the principles that governed the case, it is observed thus .

" From the principles I have just quoted it follows that one co-sharer has no justification to change without the consent of his co-tenant the state of the possession as enjoyed by the co-tenants "

The following observations therein are quite apposite to the present case.

" In the present case, joint possession of the parties was disturbed by the Municipality and that in spite of the protest of the plaintiff There can be no justification for such a high-handed proceeding . .

In the present case there are no grounds on which it can be said that the plaintiff has lost his undoubted rights to insist upon the continuation of the existing state of the possession of the common lands

It seems that the Courts below thought in the present case the plaintiff was seeking an injunction on the ground of actionable nuisance forgetting that the case was based on the ground of infringement of the rights of a co-owner by another co-owner. The plaintiff's remedy should not have been limited

1. A.I.R. 1929 Mad. 25. 2. (1924) 29 C.W.N. 643, 645, 646.

but should have included the whole subject-matter of the suit. The discretion of the Court must be exercised on recognised principles and should not be arbitrary... ....

The defendants cannot complain if they are now compelled to restore the property to its original condition by the removal of the huts built on the land which they persisted in building in spite of the institution of this suit."

In the case now before me despite the protest of the plaintiffs most high-handedly the appellant has invited notice from the municipality and purporting to act upon it has destroyed the latrine and deprived the plaintiffs of the use they were having of the common property. In my view, it cannot be said that the Courts below have exercised their discretion erroneously when granting mandatory injunction entitling this Court to interfere with the exercise of their discretion in Second Appeal.

Before I part with the case, I must remark that it is a matter for regret that the parties should have fought out this matter in three Courts, when by pooling their resources instead of spending money on litigation, they could have provided for themselves a modern latrine which will satisfy the most stringent requirements of the health authorities. If the appellant had found the location of the latrine in the changed circumstances a nuisance, he could have taken proper action and sought appropriate directions in a Court of law. It may be that a partition by metes and bounds would not be feasible. But it might have been possible with good will on both sides to evolve a solution acceptable and convenient to all the parties. It may be that the restoration of the structure to its original position would not by itself secure to the plaintiffs all the reliefs they require ; nor can it be said that justice and equity would have been meted out finally to all the parties by the restoration of the *status quo*. The appellant can in appropriate proceedings still establish that the circumstances have since so changed that it is not necessary to maintain and continue the old latrine. The decree in this case cannot preclude a properly framed suit where justice could be meted out to all the parties and amity established between the tenants-in-common. But there can be no gainsaying the fact that the action of the appellant which has given rise to the suit was unjustified and uncalled for.

In the result the Scond Appeal fails and is dismissed with costs. No leave.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P.S. KAILASAM.

E. M. Narayanaswami .. *Petitioner**

v.

T. V. Chinnathambi and others . *Respondents.*

Madras Panchayat Act (XXXV of 1958), section 25 (1)—Sentence of criminal Court against candidate for election—Disqualification—" Date of expiration thereof"—Construction

The petitioner was convicted for an offence under section 406, Penal Code, and sentenced to two months R I on 10th June, 1959, and the same was confirmed in appeal on 13th July, 1959, and the revision to the High Court was dismissed on 28th July, 1960 The petitioner was elected as the President of the Panchayat in June, 1959. He went to jail on 19th August, 1960, after his revision to the High Court failed By virtue of an order by the Government in exercise of its powers under section 16 of the Madras Panchayat Act X of 1950 directing that the sentence would not operate as a disqualification the petitioner did continue as the President during the last term For the next election now in question, the petitioner filed his nomination on 31st January, 1965 and he was elected, the objection to the nomination being rejected. After undergoing the sentence he was released on 3rd October, 1960 The election of the petitioner was set aside by the Election Court on the ground of disqualification laid down by section 25 (1) of the Panchayat Act of 1958. In a petition to quash that order.

Held, on the clear wording of section 25 (1) if a person was undergoing sentence, or his sentence expired within 5 years, he is disqualified It cannot be said that section 25 is applicable only to convictions after 2nd October, 1960, when the Panchayat Act XXXV of 1958 came in o force. The fact that under the provisions of the earlier Panchayat Act (X of 1950) the Government directed that the sentence would not operate as a disqualification or that the conviction was before the 1958 Act came into force will not make any differnce

* W P No. 2984 of 1965. 10th August, 1966.

The words "date of expiration thereof" in section 25 (1) would mean only the date on which the sentence had expired.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the Order of the Election Court, District Munsif of Tiruchirapalli dated 2nd July, 1965 and made in O.P. No. 15 of 1965 and quash the same.

V. Vedantachari for *M. S. Sethu*, for Petitioner.

N. Arunachalam, for 1st Respondent.

K. S. Bhakthavastalam, for the Additional Government Pleader, for 2nd Respondent.

The Court made the following

ORDER.—This petition is filed for the issue of a writ of *certiorari* to call for the order of the Election Court, District Munsif of Tiruchirapalli, with its connected records, and to quash the same.

The petitioner filed his nomination for election to the Panchayat on 31st January, 1965, for the second ward, a three member constitutency in Madhakudi Panchayat. Along with the petitioner, the first respondent Chinnathambi and three others filed nominations. The nomination of the petitioner was objected to on the ground that he was disqualified under section 25 of Act XXXV of 1958 in that on the date of the nomination the sentence imposed on him for an offence, had not expired within five years. The objection was overruled and the petitioner was allowed to contest. The petitioner secured 308 votes and was declared elected. The first respondent filed an election petition pleading that the nomination of the petitioner ought to have been rejected. The election of the petitioner was set aside.

The petitioner was found guilty, convicted for an offence under section 406, Indian Penal Code and sentenced to two months R I. on 10th June, 1959, by the Sub-Magistrate, and the appeal to the District Magistrate failed and the conviction and sentence were confirmed on 13th July, 1959. A revision to the High Court was also dismissed on 28th July, 1960. The petitioner was elected as the President of the Panchayat in June, 1959. He went to jail on 19th August, 1960, after his revision to the High Court failed. After undergoing the sentence, he was released on 3rd October, 1960.

Section 25 (1) of Act XXXV of 1958 may be extracted.

"A person who has been sentenced by a Criminal Court to imprisonment for any offence involving moral delinquency (such sentence not having been reversed) shall be disqualified for election as a member while undergoing the sentence and for five years from the date of the expiration thereof".

It is not disputed that the petitioner was sentenced by a criminal Court for an offence involving moral delinquency, the offence being breach of trust. The disqualification for election according to the section is during the time when he is undergoing the sentence and for five years from the date of the expiration thereof, that is five years from the date of release namely 30th October, 1960. The date of nomination being 31st January, 1965, is clearly within the period envisaged under section 25.

Mr. Vedantachari, learned Counsel for the petitioner submitted that under section 16 of the Panchayat Act, X of 1950, the Government was authorised to direct that a sentence by the criminal Court shall not operate as a disqualification and that in exercise of that power, they directed that the sentence on the petitioner would not operate as disqualification. By virtue of that order, the petitioner did continue as the President during the last term. Learned Counsel submitted that Act XXXV of 1958 came into force on 2nd October, 1960, and that section 25 cannot operate retrospectively and can take effect only in respect of convictions after that date. This contention cannot be accepted in view of the clear wording of section 25. On the date of the election if a person was undergoing sentence, or his sentence expired within five years, he is disqualified. The fact that under the provisions of the Panchayat Act the Government directed that

the sentence would not operate as a disqualification, or that the conviction was before the Act came into force, will not make any difference. It was sought to be contended that the words "date of expiration thereof" would mean the date of conviction and sentence and a period of five years from the date on which the sentence was passed must be calculated. I do not think the construction attempted is possible when the wording is clear that the period is " five years from the date of expiration thereof " " Expiration thereof " cannot refer to the date of the sentence, but only to the date on which the sentence had expired. The lower Court was therefore correct in holding that the petitioner was disqualified.

This petition is dismissed with costs of the first respondent Rs. 100.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS,

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE N. KRISHNASWAMY REDDY.

G. Gopal Chettiar *Appellant**

v.

V. V. Shanmuga Nadar & Bros., (by partner T. Duraipandian) .. *Respondent.*

Limitation Act (IX of 1908), Article 85—Limitation Act (XXXVI of 1963), Article 1 of the Schedule—Mutual, open and current account—Legal elements of

Though it is a question of fact in each case whether an account is open, mutual and current, for the purpose of such an account it must fulfil the requirement of reciprocal demands involving transactions on each side, creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations In other words, reciprocity of dealings is essential

On appeal to the Appellate Side of the High Court under clause 15 of the Letters Patent from the Judgment and Decree of the Hon'ble Mr Justice Kunhamed Kutti dated 22nd December, 1961, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.S. No 77 of 1960 (Transferred O.S. No. 1074 of 1959 on the file of the City Civil Court, Madras).

V. K Thiruvenkatachari, R. Vaidyanathan, and *R. G. Rajan,* for Appellant.

C. Vasudevan , for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, C. J —The essential facts of this appeal, from the Judgment and Decree of Kunhamed Kutti, J , in O S. No 77 of 1960 before the learned Judge, may be briefly set forth as follows V. V. Shanmuga Nadar & Brothers (plaintiffs) sued the defendant Gopal Chettiar, who is the appellant, for moneys in respect of dealings said to be due upon certain accounts relating to the business of the defendant at Pollachi, Coimbatore and Kumbakonam. According to the case in the plaint, in respect of orders placed by the defendant with the plaintiffs, for purchase and supply of goods, the plaintiffs advanced moneys and were entitled to repayment of the moneys with interest. The dealings took place between 26th February, 1953 and 15th March, 1959, on the basis of a mutual, open and current account, according to particulars furnished along with the plaint. Very briefly stated, the defendant put forward, as his main plea, a plea of limitation. According to him, the dealings were not on the basis of a mutual, open and current account, and, many of the transactions were thus time-barred, particularly in relation to the Coimbatore account. The plaintiffs were not entitled to make appropriations of payments in the manner that they had done, nor were they entitled to charge interest on outstanding advances. Of the issues framed in the suit, the main issues that concern us are.

1. Whether there was a mutual, open and current account between the parties ?
2. Whether the suit was in time ? and
3. Whether there was a contract to pay interest at certain rate ?

In view of the order that we propose to make in this appeal, remanding the suit for further and full determination in the light of our observations, since it appears

* O.S.A.No. 56 of 1962. 12th August, 1966.

beyond controversy, in our view, that certain vital aspects have not been tried out at all, we think that we should not proceed into the merits in any great detail. But, indisputably, we feel constrained to record our reasons why we consider this remand of the suit for further trial essential in the interest of justice. Our observations must not be regarded as any pre-judgment of the merits, since the suit is now going to have a more extensive and adequate trial, covering all issues in controversy between the parties, and, all vital aspects of such issues.

Firsly, the very procedure of trial in the suit has inevitably given rise to some difficulty. That, of course, cannot be a matter for which the learned Judge could be regarded as responsible, in any view. The plaintiffs adopted the somewhat curious procedure of producing all their books of accounts, but actually not marking those books as evidence; on the contrary, schedule of entries, which is Exhibit D-1, and which, in fact, forms the main document in the case, was extracted from the plaint schedule, and marked by defendant. It must immediately be conceded that the defendant (appellant), far from objecting to this course, of the failure to exhibit the original account books, based his defence upon Exhibit D-1 itself, with the result that neither the Court nor the party had the advantage of a scrutiny of the original accounts, ledgers and cash books. In our view, that has handicapped the trial, in the sense that it has not been possible to focus attention on certain vital aspects of the controversy between the parties. Another lacuna or defect in the trial, has been that the oral evidence in the entire trial consists exclusively of the testimony of Dorai Pandian (P.W. 1), a partner of the plaintiff firm The defendant did not get into the box, and did not throw light, by means of testimony, upon the defences that he sought to raise in contesting this suit Further, as we shall presently show, certain vital aspects of the material impinging on the main plea of limitation have not been brought forward and elucidated at all during the trial; or, apparently, even during the arguments before the learned Judge.

As the plaint was filed, it sought to do this; there were dealings between the parties relating to three places or branches, of the defendant viz., Coimbatore, Kumbakonam and Pollachi, of which it is conceded by Sri Thiruvenkatachari for the defendant (appellant) that the accounts, relating to the Pollachi branch do form an open, mutual and current account, within the meaning of Article 85 of the original Limitation Act, now Article 1 of the Schedule to Act XXXVI of 1963. But with regard to the other two branches, and the Coimbatore branch in particular, the appellant strenuously contended that there were no open, mutual and current accounts. The further plea was that there was a distinct jural relationship between the parties, in respect of the accounts of each branch. They were separable, and should be regarded separately. But, admittedly, when the plaint was filed, the plaintiffs brought forward the account of the Pollachi branch into the schedule, thereby converting the accounts of the Coimbatore and Kumbakonam branches into a consolidated credit account in favour of the plaintiffs One impotant argument of Sri Thiruvenkatachari for the defendant (appellant) is that this is not justified, and that this pressing into service of the account of the Pollachi branch, on the very eve of the suit, was merely to create a semblance of an open, mutual and current account, which was not actually the case with regard to the Coimbatore and Kumbakonam branch accounts. In other words, and now stressing the Coimbatore account in particular, many items would be time barred, according to the appellant, but for this expedient.

It thus became essential to consider whether the three accounts could be consolidated in that manner, as the plaintiffs did, or whether such account should be regarded separately, as furnishing a distinct jural basis of obligation between the parties. On this, we find that there was not even a clear and distinct issue, nor can we find any discussion of this aspect, as such, in the judgment of the learned Judge. Apparently, in the manner in which the suit was presented, tried and argued, this essential aspect was lost sight of. We must, therefore, direct that this should be framed as a separate issue, and tried out now, both parties being at liberty to adduce oral and documentary evidence on this aspect.

Another vital aspect, concerning which, again, there is difficulty, is the finding of the learned Judge (page 17 of the printed papers) that the account was open, mutual and current because "the plaintiffs had sold the defendant's goods on commission basis, and credited him with the sale proceeds of such goods." Indisputably, if there were such mutual obligations the account would be open, mutual and current. But Sri Thiruvenkatachari contends that, apart from the Pollachi branch, this observation of the learned Judge is factually incorrect, if it is intended to apply to the Coimbatore and Kumbakonam accounts. This, again, is a matter on which evidence is essential, and, it is equally essential that the original accounts should be produced and marked for this purpose. The truncated schedule marked as Exhibit D-1, cannot at all suffice for this purpose.

Concerning the legal elements of an open, mutual and current account, the matter is now well-settled, in view of two recent decisions of the Supreme Court, and we think it is sufficient to refer to them. The first of these decisions is *Hindustan Forest Co.* v. *Lal Chand*[1], and it refers to the prior case-law including *Tea Financing Syndicate Ltd.* v. *Chandrakamal*[2]. That Calcutta decision, the judgment wherein was delivered by Rankin, C.J., refers to two precedents. The first of these is *Hirada* v. *Gidigi*[3], where Holloway, Ag. C.J., probably laid down the earliest formulation of the canon on the subject. The learned Judge said that, for the purpose of such an account,

"there must be transcactions on each side creating independent obligations on the other, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations."

Watson v. *Aga Mehedee Sherazee*[4], may also be instanced as another application of the principle to the given facts In referring to the judgment of Rankin, C.J., their Lordships of the Supreme Court observed that this canon has not been subsequently departed from, and that though it is a question of fact in each case whether the account is open, mutual and current, the account must fulfil the requirement of reciprocal demands involving transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. In other words, reciprocity of dealings is essential, and the decision in *Keshanchand* v. *Banking Corporation*[5], may be taken as another instance of the application of the same principle to the given facts.

In the present case, we have been taken in great detail through the data available as Exhibit B-1. Sri Thiruvenkatachari strenuously contended that these do not evidence reciprocal demands and obligations of the character specified in the precedents; on the contrary, those are purely unilateral transactions, the demand in every case relating to a specific item of account, which is met by a hundi which has been honoured by the defendants (appellant). As we stated earlier, there is an admission that there are reciprocal demands and obligations in the Pollachi account, but it is strongly denied that the Coimbatore and Kumbakonam accounts fulfil the criterion. On this aspect, the learned Judge seems to have been somewhat misled, because of two considerations. Firstly, he thought that there were entries with regard to sales by plaintiffs of defendant's goods on a commission basis for which the plaintiffs had credited the defendant (appellant) in respect of the sale proceeds. We have already quoted this extract from the judgment, and according to learned Counsel for the appellant, that applies strictly and exclusively to the Pollachi account, and not to the other accounts. Secondly, in considering the matter of the alleged implied appropriation urged on behalf of the appellant, with reference to the principles of sections 59, 60 and 61 of the Contract Act, the learned Judge, again, seems to have thought that the accounts were open, mutual and current

1. (1960) S.C.J. 41 : (1960) 1 S.C.R. 563 : A.I.R. 1959 S.C. 1349.
2. I.L.R. 38 Cal. 649.
3. (1871) 6 M. H. C. R. 142.
4. (1874) 1 I.A. 346.
5. (1965) 2 S.C.J. 174 : (1965) 1 Comp.L.J. 355: A.I.R. 1965 S.C. 1711.

because the Pollachi account was merged with the other two accounts, and, hence, that the question of any implied appropriations did not at all arise. As we pointed out, the problem in this case is whether the accounts could be consolidated in this manner, on the eve of the plaint, as the plaintiffs, sought to do. If such consolidation was not permissible or possible, it will be a question of fact and evidence whether the Coimbatore and Kumbakonam accounts should be properly regarded as open, mutual and current accounts.

Both with regard to this aspect, and with regard to the question of the implied appropriations urged on behalf of the appellant and stressed by Sri Thiruvenkatachari on the principles of section 59 of the Contract Act, we do not propose to make any pronouncement now, in view of the order of remand. We think we have sufficiently elucidated that the matter is fairly intricate, and that adequate material has not been placed before Court by either party, or by both the parties. For this, of course, the parties are themselves to blame, but, we are unable to see how there can be a satisfactory adjudication of the rights in this matter, on such a truncated trial.

We do not think it is necessary to say anything more. The necessary issues will now be framed in the light of our observations, and the suit be tried, with liberty to both the parties to adduce fresh oral and documentary evidence; needless to say, we expect the defendant to examine himself, if he is really serious about his case that the Coimbatore and Kumbakonam accounts did not involve reciprocal demands and obligations and, further, that these accounts were jurally distinct and that a consolidation was unjustified. The costs of this appeal will abide and follow the result of the remand. The Court-fee paid will be refunded.

V.K. ——— *Order accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

S. Sundara Komaya Naicker . *Petitioner**

v.

The Authorised Officer of Land Reforms, Chockikulam, Madurai, and another .. *Respondent.*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), *section* 10 (5) *and rule* 8 *of the Rules framed under the Act—Service of notice on concerned persons—Personal service to be effected before service by affixture attempted—Service by affixture at the first instance—Irregular—Writ.*

Under rule 8(*d*) of the Rules framed under the Madras Land Ceiling Act, in the case of individuals notice should be served by delivery or tender of the same to the person concerned or his Counsel or authorised agent or to some adult member of the family, or by sending the notice to the concerned person by registered post, acknowledgment due. Clause (iv) of sub-rule (*d*) of rule 8 provides that if none of the aforesaid modes of service is practicable, service may be effected by affixing the notice in some conspicuous part of the last known, place of residence or business of the person concerned. Service by affixture without taking the other modes of service would be irregular and not in compliance with the rule.

On the facts it was held that no prejudice has been caused and no writ would issue

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to call for the records on the file of the first respondent pertaining to the petitioner's lands in the Notification issued by the first respondent under section 12 of Madras Land Reforms (Fixation of Ceiling on Land) Act, 1962 and published in Supplement Part III of the *Fort St. George Gazette* dated 12th January, 1966 and to issue a writ of *mandamus* to the first respondent directing him to prepare the final statement in regard to the petitioner's lands under section 12 of the said Act after giving the petitioner an opportunity to file his objections to the draft statement under section 10 (5) of the Act.

* W.P.Nos. 1302 and 1303 of 1966. 23rd August, 1966.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 2nd respondent and quash the Notification issued by the 2nd respondent under section 18 (1) of the Act dated 23rd February, 1966, in G.O. Ms. No. 343, Revenue, dated 16th February, 1966.

Dolia, for Petitioner.

The Government Pleader, for Respondent.

The Judgment of the Court was delivery by

Veeraswami, J.—The petitioner complains that he was not given notice and opportunity contemplated by section 10 (5) of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961. He made a return on 4th February, 1963. A draft statement under section 10 (3) was prepared, and the final statement was published on 12th January, 1966, as required by section 12. It appears that even the notification under section 18 has been made on 23rd February, 1966. From the counter-affidavit by the State, we find that the notice required under section 10 (5) was served on the petitioner but by affixture.

It is contended that this service of notice by affixture is irregular and is not in compliance with the mode of service prescribed by rule 8. That rule, by sub-rule (*d*), says that, in the case of an individual, notice should be served by delivery or tender of the same to the person concerned or his Counsel or authorised agent or to some adult member of the family, or by sending the notice to the person concerned by registered post acknowledgment due. Clause (iv) of sub-rule (*d*) of rule 8 is to the effect that, if none of the aforesaid modes of service is practicable, service may be effected by affixing the notice in some conspicuous part of the last known place of residence or business of the person concerned. It is not stated for the State that any of the modes was tried and had failed, so as to entitle the Department to take it for granted that service had to be done only by affixture There is no doubt, therefore, that the mode of service on the petitioner was irregular and not in compliance with the requirements of rule 8, as to the manner of service of notice under section 10 (5).

Nevertheless, we consider that the petitioner is not entitled to succeed. This is because while submitting the returns he had to fill in separate prescribed forms, one of which relating to the lands which the petitioner desires to retain subject to the ceiling, and the other mentioning the particulars of lands which he would treat as surplus and available for taking over. In these forms, he gave the name of the village, survey number, extent and other particulars of lands which he desired to retain. He also mentioned, in the other form, the particulars of lands including the village, survey number and extent which he would treat as surplus. The Authorised Officer, in preparing the draft statement and the final statement, simply went by the particulars the petitioner himself furnished. In view of this, there is clearly no substance in the contention that, because of defective service of the notice under section 10 (5) he was, in any way, prejudiced. What is, however, contended for the petitioner is that he made a mistake in mentioning one or two lands as being surplus which he would in fact like to retain. That is a mistake for which the petitioner himself is responsible, and we do not think, that he can build any argument on that basis and contend that for want of notice he had been prejudiced.

The petitions are dismissed but with no costs

V.S. *Petitions dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE N. KRISHNASWAMY REDDY.

S. Michael Udayar .. *Appellant**

v.

S.P. Periasami Konar and others . *Respondents.*

Contract Act (IX of 1872), section 23—Works contract with Government—Contract prohibiting assignment or sub-letting of the contract—Contractor entering into partnership with others for performing the contract—Partnership if illegal as opposed to public policy.

Partnership Act (IX of 1932), section 19 (h)—Partner of a firm entering into partnership agreement with third parties for and on behalf of his firm—Suit by him for accounts against partners of second firm—Necessary parties.

Where a person enters into a works contract with the Highways for the construction of a road, the terms of which prohibited the assignment or sub-letting of the contract the fact that he enters later on into a partnership with others for performance of the contract would not render the partnership illegal as being opposed to public policy, merely because of the prohibition against assignment or sub-letting.

A contract can be said to be illegal if it is opposed to statute or public policy. What is public policy is difficult to define. One can easily understand what it is though the range of understanding may vary with the individuals. But no such difficulty arises in this case as clearly the works contract with the Highways would not involve any public policy. Neither the Contract Act nor the Partnership Act treats the Government on any special footing for purposes of contract or formation thereof or for their enforceability.

Where a partner of a firm purports to enter into a partnership agreement with third parties for and on behalf of his firm he must be deemed to have entered into the partnership only in his individual capacity in the absence of proof to show that he had authority to enter into a partnership on behalf of his firm. In the absence of such proof by the parties resisting it, a suit for rendition of accounts brought by him against the partners of the second firm cannot be said to be not maintainable because the partners of his own firm are not made parties to the suit.

Appeal against the Decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 8 of 1960.

R. Ramamurthi Ayyar and *Balasubramaniam*, for Appellant.

R. Krishnamachari, A. Sundaram Ayyar and *S. V. Jayaraman*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal by the plaintiff is from a decree of the Subordinate Judge of Sivaganga dismissing the suit against the respondents for rendition of accounts. His case was that he entered into a contract with the Highways for construction of Kodaikanal-Moonar Road and commenced work on 25th January, 1955. He took the respondents (defendants) as partners in the single venture on the understanding that it should come to an end at the conclusion of the works contract with the Highways and the passing of the final bills relating thereto. The terms of partnership were reduced to writing in a deed dated 18th May, 1955 and the firm which so came into existence was styled as 'Michael Udayar & Co.' Each of the partners of this firm was to contribute a share-capital of Rs. 10,000 and that if further capital was necessary, they should contribute the same in equal shares by raising loans. They were to share the profits of the firm equally. The business of the partnership was to be managed and conducted by the respondents subject to the control of the appellant and the respondents were to maintain proper accounts. In case of differences between the partners touching the work, the partnership should be dissolved after a month's notice given by any one of the partners. This arrangement was given effect to but according to the plaintiff, the defendants did not carry on the work faithfully and honestly and they were found to be negligent with the result, the construction work was delayed and eventually the Department itself took over the work for completion somewhere in March, 1958. As a result of the contract-work having thus come to an end in March 1958, by the terms of the partnership, so the plaintiff claims, the firm became dissolved then. The suit was

* A. No. 259 of 1962. 8th September, 1966.

resisted by the defendants on various grounds which included that the partnership was an illegal one, that since the firm had been dissolved even as early as on 19th August, 1956, the suit was barred under Article 106 of the Limitation Act, 1908 and that in any case, since the plaintiff entered into an agreement of partnership on behalf of Michael Udayar & Co., a firm of partnership in which the plaintiff was a partner with certain others, the suit brought by the plaintiff in his individual capacity and in his own name was not maintainable.

The Court below in the first instance framed three issues covering the first two grounds, which we mentioned of the defence in the written statement but on 21st August, 1961 settled two additional issues raising the last ground of the defence. On the question of limitation, the Court below itself observed that though it was raised in the pleadings, learned Counsel on either side did not press for an issue, nor either argue the question. Nevertheless the Court below went into that question and on its finding on the evidence that the firm must be deemed to have been dissolved on 19th August, 1956, held that the suit which was instituted on 30th March, 1960, was barred by limitation. It also found that as the provisions in the Madras Detailed Standard Specification were deemed to be incorporated in the works contract entered into by the plaintiff with the Highways and those provisions among others prohibited assignments or sub-letting of the contract and as the plaintiff had, as claimed in the suit, entered into a partnership with the respondents, this was opposed to public policy and therefore, the contract of partnership was illegal. The finding of the Court below is that the plaintiff having failed to implead the other partners of his firm, the suit was not maintainable and must fail.

We are of the view that the Court below was not correct on any of the points aforementioned. We cannot but express our surprise that the learned Subordinate Judge should have led himself to think that merely because the works contract with the Highways prohibited assignment or sub-letting and the plaintiff entered into a partnership with the respondents any public policy was involved therein. Obviously, the contract entered into by the plaintiff with the Highways is just like any other works contract and the fact that the Government was a party thereto would make no difference to the contract. Neither the Contract Act nor the Partnership Act treats the Government on any special footing for purposes of contracts or formation thereof or their enforceability. Apparently the Subordinate Judge proceeded on the basis, and quite erroneously, that wherever there was a contract with the Highways for construction of road, public was involved and, therefore, also public policy. It is hardly necessary to point out that this line of reasoning is quite incorrect. A contract can be said to be illegal if it is opposed to statute or public policy. What is public policy is difficult to define. One can easily understand what it is though the range of understanding may vary with individuals. But in this case no such difficulty arises as clearly the works contract with the Highways involved no public policy and the entering into the suit partnership cannot be regarded as contravening any public policy. We may also add that Mr Sundaram Ayyar, learned Counsel for the respondents rightly realised the position and would not convince us that the Court below was right on this point. Nor are we satisfied that the Court below was right in its assumption that the suit firm was dissolved on 19th August, 1956. As far as we can see from the record, there is no evidence direct or circumstantial which supports that finding of the Court below. It is true that there is evidence to the effect that the plaintiff was urging upon the defendants by certain letters that they should meet in the second week of August, 1956 to settle the affairs in relation to the partnership. Beyond that, as we said, there is no basis for supporting the finding. It is true that the Court below has not stated that there is any direct evidence but it was inclined to infer that there must have been a dissolution on 19th August, 1956, and that this inference the Court purported to draw from Exhibit B-1 but we can find no justification for this.

That takes us to the last ground as to the maintainability of the suit. The actual finding of the Court below is that the plaintiff having entered into partnership with the respondents not in his individual capacity but as representing Michael Udayar

& Co., the suit instituted by him in his individual capacity had not been properly laid and could not be sustained. The contention has been developed before us on the ground that a firm cannot be a partner of another firm and that where factually a firm enters into a partnership with another firm, the true position in law would be that the partners of the joining firm will automatically become the partners of the new firm. As a proposition of law, no exception can be taken to it. A firm is certainly not a legal entity and cannot be regarded as a person unlike a company which is a corporate body and a person in the eye of the law. A firm is but a compendious expression to indicate the relationship brought about between two or more persons who agree between themselves on a common venture on terms based on mutual consent. These propositions are now well settled and reference need be made only to *Seodoyal Khemka* v. *Joharmull Manmull*[1], *Dulichand* v. *I. T. Commissioner*[2], *Muhammad Abdul Latiff* v. *Sheik Ismail*[3] and *Firm Brij Kishore* v. *Sheo Charan Lal*[4]. In the third case cited, a Division Bench of this Court held that though a firm was not a juristic person and as such could not enter into a partnership, there was nothing to prevent the partners of the firm as individuals being partners in another firm by the use of the firm's name. In the Allahabad case it was held that where a firm entered into a partnership with other individuals, one of the partners of such firm could sue for accounts on behalf of all in accordance with the form of procedure laid down in Order 30 of the Code of Civil Procedure For the appellant the contention is that where a partner of a firm purports to enter into a contract of partnership with another firm representing his firm and on behalf of it, it is not necessary for him in a suit for rendition of accounts against his partners in the second firm to implead the rest of the partners in his own firm as plaintiffs. In support of the proposition reliance is placed on *Sathappa Chetty* v. *Subramania Chetty*[5]. We are of the view that this decision lays down no such proposition.

Mr. Sundaram Ayyar for the respondents has pressed upon us that in such a case, the plaintiff must take other persons of his own firm as plaintiffs or defendants and that in the absence of it, the suit will not be maintainable. On the view we take of the facts of this case, we think it unnecessary to decide this question. It is true the partnership agreement with the respondents recites as a preamble that the plaintiff entered into it on behalf of his firm S. Michael Udayar & Co., but whether he signed the document in that capacity is not clear. The evidence is to the effect that he entered into the partnership for and on behalf of S. Michael Udayar & Co. but his assertion was that it was his firm, that he was its proprietor and so he was entitled to sue in his own individual name. The real question however is whether assuming that he entered into the partnership agreement for S. Michael Udayar & Co., he had authority to do so under the terms of the partnership agreement relating to S Michael Udayar & Co The only provision that Mr. Sundaram Ayyar could point to in that partnership agreement is this :

"If it is found necessary to take in further shareholders besides the parties to this partnership, these parties shall be taken in only after obtaining the consent of all the said parties herein "

Clearly this provision only means that the partners shall be at liberty to take any further partners to that firm and it certainly does not mean that the plaintiff was authorised to enter into a partnership with third parties on behalf of the firm. Our attention has not been invited to any other evidence to justify the stand that the plaintiff had authority to enter into a partnership with th respondents on behalf of Michael Udayar & Co No doubt no point would appear to have been taken in that form in the Court below. But the fact remains that if the respondents maintain that the suit as framed does not lie, it was for them to show that the plaintiff had authority to enter into a partnership with the respondents on behalf of Michael Udayar & Co. If such authority is not shown notwithstanding the recital in the preamble of agreement with the respondents, it has to be taken that the plaintiff entered into the agreement only in his individual capacity. It is because, as a fact he had no authority to represent Michael Udayar & Co., and commit it to the suit agree-

1 I L R. 50 Cal 549
2 (1956) S C J 317 (1956) 1 M.L J (S.C.) 164. A.I.R. 1956 S.C. 354.
3 A I R 1934 Mad 9.
4 A I R 1938 All 69.
5. (1927) 53 M.L.J. 245.

ment. We are, therefore, of the view that the objection to the maintainability to the suit cannot be sustained

The appeal is allowed and the suit is remitted to the Court below for trial. Opportunity will be given to both sides to adduce documentary evidence on the question whether the suit firm was dissolved on 19th August, 1956, and oral evidence will only be admitted for purpose of marking such documentary evidence Costs so far will be borne by each party both here and below. Court-fee paid on the memorandum of appeal will be refunded

V.K. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE K. SRINIVASAN.

B. R. Devadoss .. *Appellant**

v.

Ponnammal and others .. *Respondents.*

Hindu law—Alienation—Alienation of joint family property by father having two minor sons—Third son born after the alienation if can attack the alienation—Period of limitation

A non-consenting member of a coparcenary gets a right to attack an alienation the moment the impugned alienation is effected That right continues and comes to an end with the expiry of the period of limitation The right thus available to the non-consenting coparceners could also be exercised by a son born after the alienation but that right is co-existent with the right of other non-consenting coparceners It is not an individual or separate right that the after-born son gets If that should be so it would follow that when once the cause of action had arisen that is to say, the impugned alienation, time begins to run So that if on the date of the impugned alienation of joint family property by a father there are two minor sons (as in the instant case), at the best it may be said that the period of limitation for attacking the sale will extend upto three years after the attainment of the majority of the youngest of them The right to attack the alienation which in those circumstances is available to an after-born son can be exercised only upto the date when the period of limitation so indicated expires The after-born son cannot claim a right in his own person upto the date ending with the years after he attains majority

Visweswara Rao v *Surya Rao*, A I R 1936 Mad 440, followed

Appeal against the Decree of the District Court, Madurai, in Appeal Suit No 173 of 1961, preferred against the Decree of the Court of the District Munsif of Madurai Town in Original Suit No 178 of 1960.

R Gopalaswamy Ayyangar, and *K N Balasubramaniam*, for Appellant.

K Sarvabhauman, for Respondent.

The Court delivered the following

JUDGMENT—The plaintiff is the son of one Ramachari who died in 1959 The second and third defendants are his brothers The plaintiff sued for a partition of his one-fourth share in the suit property, which he claimed belonged to the joint family of which the members were the plaintiff, defendants 2 and 3, and the fourth defendant The fourth defendant is the first cousin of Ramachari, the plaintiff's father. It appears that the property in question was sold by Ramachari to the fourth defendant in 1934. According to the plaintiff, the property had fallen to Ramachari by survivorship, and the father Ramachari could not sell the property except for necessity or benefit or for the discharge of any antecedent debt, none of which obtains in the case. The sale in 1934 was an oral sale, which, however, was confirmed by a written document executed in 1957 by Ramachari, the plaintiff's father, and defendants 2 and 3, his brothers It may also be stated that the plaintiff was born in 1939, long after the impugned sale of 1934 But plaintiff claims that he has nevertheless the right to question the alienation, his brothers, the second and third defendants, having been in existence on the date of the impugned sale.

The contesting defendant is the fourth defendant According to him, and these facts are not disputed, the grandfather of the plaintiff, one Venkatachalapathi Iyer, had two brothers. The fourth defendant is the son of one of the brothers. The third brother Perumal, became an insolvent In the sale of Perumal's properties, Ramachari, the father of the plaintiff, one Subbarama Iyer, the deceased brother of

* S.A. No. 998 of 1962. 11th August, 1966

Ramachari, and the fourth defendant himself jointly purchased the properties benami in the name of one Krishna Iyer. The fourth defendant contributed a sum of Rs. 274 for this purchase Later, the nominal purchaser Krishna Iyer executed a release in favour of the three real owners Subbarama Iyer died in 1948 and his share passed to Ramachari by survivorship The result was that Ramachari and the fourth defendant were the joint owners of this property Ramachari agreed to convey the suit property, which is D No 27, to the fourth defendant, the consideration being the contribution made by the fourth defendant for the purchase of the insolvent's property Virtually, therefore, Ramachari obtained for the family the fourth defendant's interest in that property which was purchased in the Court-auction in consideration of which he conveyed D No 27 to the fourth defendant Ever since then, and this was in 1934, the fourth defendant had been in enjoyment of the property, getting the registry transferred in his name and paying the taxes therefor The consideration was valid and the sale was also claimed to be for the benefit of the family This oral sale of 1934 was confirmed by the execution of a regular document in 1957 by Ramachari and by defendants 2 and 3, his sons who had attained majority by them At the same time, the fourth defendant executed a release document giving up his interest in the item purchased in Court-auction.

The trial Court was satisfied that the oral sale of the year 1934 is true Indeed, the plaintiff himself did not deny that transaction. It further held that in whatever manner the fourth defendant might have come into possession of the property, there was no doubt that from 1934 down to the present day, he had been in exclusive possession thereof and had perfected title by adverse possession It held further that the plaintiff was born long after the sale His two brothers, the second and third defendants, became majors in 1948 and 1950 respectively They were competent to question the validity of the transaction and had not chosen to do so. Their right to question the transaction came to an end long ago The trial Court was of the view that in these circumstances, the plaintiffs could not claim a further extension of the period of limitation in his favour and accordingly that the suit was barred by limitation On the question of the binding nature and the validity of the sale, the conclusion was in favour of the fourth defendant

The plaintiff appealed against the dismissal of his suit The lower appellate Court, while holding that the suit was maintainable, found that the suit was barred by limitation. On all other questions, it found against the plaintiff-appellant. It was satisfied that there was virtually an exchange of two properties one belonging to the family, D No 27, and the other purchased in Court-auction, D No 27-A, and that having regard to the prevailing prices at that time, the consideration was not at all inadequate It upheld the fourth defendant's contentions and dismissed the suit

Mr. K N Balasubramanyam, learned Counsel for the plaintiff-appellant, urges that there was no proof of necessity justifying the sale of joint family property He also attacks the finding of the Courts below that the plaintiff's suit is barred by limitation According to him, notwithstanding the fact that the plaintiff is a son born to his father after the date of the impugned alienation, he cannot be denied the right to attack the alienation by the father, provided that he can do so on grounds permissible under the Hindu Law. Learned Counsel does not deny that if the plaintiff had been the only son of his father who was born after the date of the alienation, his right to attack the alienation cannot be maintained. But he urges that on the date of the alienation he had two brothers who are the second and third defendants, who were minors, and so long as the right to attack the alienation was available to these minor sons, his elder brothers he too would be entitled to invoke that right, notwithstanding that he is a son born after the date of the impugned alienation To the extent this argument supports the claim to the maintainability of a suit by a junior member of a joint Hindu family questioning an improper alienation effected by his father, the joint family manager, it can no doubt be accepted But the further question arises as to the period of limitation that is available to a person in the position of the plaintiff. Mr. Balasubramanyam in effect claims that every

minor son would have an extended period of limitation till he attains the age of 21 years, despite the fact that an elder son, who might have exercised a similar right, had failed to exercise it till he attained 21 years of age In effect, therefore, if a father has a number of sons, an alienation effected by the father at a time when he had only one son could be continued to be attacked by every son of his till the last of them attains the age of 21 years Put in that manner, the proposition appears to be exceedingly unsound to my mind. To restate the facts, the plaintiff himself does not dispute that the property in question was sold in 1934, though the confirmatory document was executed only in 1957 Nor is it denied that during this lengthy interval, it was the fourth defendant who was openly enjoying the property as the absolute owner thereof That he had put up a construction thereon and had mortgaged it even before the document conveying the site to him was executed in 1957 is admitted. It is also not in dispute that the two elder brothers of the plaintiff became majors in 1948 and 1950 respectively, and giving them the extended period of three years after they attained majority, in so far as they were concerned, any attack upon the impugned transaction would have become unavailable by reason of the law of limitation by 1953 at the latest The question is whether the plaintiff, who was born in 1939, five years after the date of the alienation, would be entitled to the period of limitation ending with three years after he attained majority, that is, upto 1960.

In *Natarajan* v *Karumana Gounder*[1], the question arose in a slightly different form. There, in a suit by a son seeking to set aside an alienation by the father, it was established that there was an elder son who acted as the manager of the family both in law and in fact, and that being so, he became a person competent to give a valid discharge under section 7 of the Limitation Act, and the failure of such a person, who became the manager, to set aside the alienation within three years of his attaining majority was held to operate as a bar against the plaintiff and the younger brothers as well The decision of the Privy Council in *Jayasheer Singh* v. *Udaya Prakash*[2], though it apparently supports the claim of the plaintiff in the present case, really proceeded upon other grounds There it was held that a suit brought by the younger son within three years of attaining majority to avoid a sale by the father is not barred by limitation, although the elder son had attained majority more than three years earlier and had taken no steps to question the alienation The facts would appear to show that both the sons existed at the time of the impugned alienation. It was not a case where the elder son occupied a position in which he could give a valid discharge under section 7 of the Limitation Act, in which event, the failure of the elder son to question the transaction may well defeat the right of the younger son as well. The real principle governing such cases is clearly indicated in *Panchaiti Akara* v. *Surajpal Singh*[3]. That was a case where the right of a son born after the impugned alienation was considered The Judicial Committee while stressing the fact that a member of a joint Hindu family must be content with the family estate as he finds it at his birth, or, at any rate, he cannot complain of anything done before the period of gestation, lay down that there is an exception to this principle, which is that if the child which objects to the alienation comes into existence or is conceived after the alienation, but there is already a child born before or conceived before the alienation, the overlapping of the two lives would enable the later-born son to contest the validity of the father's act. The Judicial Committee, however, did not think it necessary to determine the exact extent of the right of the after-born son, in the light of the law of limitation But, if there is overlapping of the lives, as indicated, then the after-born son would obtain the right to contest the validity of the father's alienation, but his right arises solely by reason of the fact that there is already a child in existence who was born or conceived before the impugned alienation. In *Visweswara Rao* v. *Surya Rao*[4], a Bench of this Court specifically laid down thus:

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1 (1933) 1 M L J 81. (1963) 76 M L W 199
2. (1925) 50 M L J 344 . L R 53 I.A 36.
3. A.I.R. 1945 P.C. 1.
4 (1935) 70 M L J 360 · A I R 1936 Mad. 440.

"Whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting The right to attack begins to exist at the moment of the alienation and at the highest exists in all members of the family that exist while such right of action is in tact If that right of action is lost by those members of the family who had it when it arose, i e, those coparceners who were in existence and not consenting at the time of the alienations, if that right of action is lost by them by the operation of the statute of limitation, it is lost to the family and does not live on in some child who becomes a coparcener even during the lifetime of the coparceners that existed when the alienation took place where such coparcener's cause of action has been barred And by parity of reasoning, just as where the right of action possessed by the coparceners existing at the time of the alienation if barred is lost, not only by them but also by any member of the family later born if they allowed the period of limitation to expire, so it is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death before there came into existence the after-born child, for the after-born child has got no right of action in himself, no individual and separate cause of action that springs up immediately he is born, but his right to contest, if any, is derived from the right that those in existence at the time of the alienation who were not consenting had, and that right is lost to him when it is lost to them, and it is lost to them when they die, or when they permit the period of limitation to expire."

The principle of this decision proceeds on the basis that a non-consenting member of a coparcenary gets a right to attack an alienation the moment the impugned alienation is effected That right continues and comes to an end with the expiry of the period of limitation, for when once the period of limitation starts, no subsequent disability or inability to sue would stop it. The right that is available to the non-consenting coparceners could also be exercised by a son born after the alienation, but this decision lays down that that right is co-existent with the right of other non-consenting coparceners It is not an individual or separate right that the after-born son gets If that should be so, it would follow that when once the cause of action had arisen, that is to say, the impugned alienation, time begins to run If on the date of the impugned alienation there is more than one person, let us assume both minors, existing, at the best, it may be said that the period of limiation will extend upto three years after the attainment of the majority of the youngest of them. The right to attack the alienation which in those circumstances is available to an after-born son can be exercised only upto the date when the period of limitation so indicated expires The after-born son cannot claim a right in his own person upto the date ending with three years after he attains majority. That is the clear purport of this decision If this decision is applied, it is obvious that the period of limitation for attacking the impugned alienation expired in or about 1953, when the younger of the two defendants, defendants 2 and 3, attained the age of 21 years.

In this view, against which no authority has been cited, there is no doubt that the Courts below were right when they held that the suit was barred by limitation.

It is unnecessary to consider whether the alienation was supported by necessity. However, looking at the matter in the light of the circumstances of the family in 1934 and considering also that the transaction was among the members of the family and that it was executed not only by the plaintiff's father Ramachari but also by his brother Subbarama Iyer, who were members of a joint family at that time, I am inclined to agree with the view taken by the Courts below that the sale was certainly for the benefit of the family At that date, the plaintiff's father, the fourth defendant's father and Subbarama Iyer, the plaintiff's uncle, had jointly purchased an item of property which certainly did not become joint family property The fourth defendant had contributed towards that purchase and by entering into the impugned alienation, the claim of the fourth defendant in that item of property so purchased was liquidated and the property jointly purchased in that manner became the exclusive property of the plaintiff's family. The two adult members, the plaintiff's father and the plaintiff's uncle, who were parties to the transaction, are now dead. That property itself had belonged to Perumal, the plaintiff's grand-uncle, and had been brought to sale in insolvency proceedings Apparently, with a desire to get back the properties which originally belonged to the family but which would otherwise be lost to them, the plaintiff's father and his uncle entered into this transaction, thereby also discharging a debt of Rs 274 being the share of contribution of the fourth defendant. In these circumstances, it is too much at this distance of

time to be asked to accept the plaintiff's claim that the sale was in excess of the powers of the father of the joint Hindu family. Added to these is the fact that the fourth defendant has been in possession of the property for over 25 years dealing with the property as his own Though that might not affect the right of a junior member of the coparcenary to challenge the alienation, that fact also can be considered in the light of necessity or benefit.

The result is the contentions of the appellant fail. The appeal is dismissed with costs

No leave.

V K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K. S RAMAMURTI

Rajah V Maheswara Rao .. *Plaintiff* *

v

Rajah V. Rajeswara Rao . *Defendant*

Civil Procedure Code (V of 1908), Order 23, rule 1—Applicability—Partition suit—Plaintiff's right to withdraw—Limits to—Passing of preliminary decree

In a partition action till a preliminary decree has been passed the plaintiff is at liberty to withdraw the suit.

So far as a suit for partition or a suit for redemption is concerned, it is axiomatic that, when the plaintiff withdraws his suit, he will be entitled to file a fresh suit as the cause of action is recurring cause of action. Even if the plaintiff is not granted permission, under Order 23, rule 1, Civil Procedure Code, he will nevertheless have a right to file a suit for partition at any time he pleases

R. Ramamurthi Iyer and *R. Srinivasan*, for Plaintiff

S. Govind Swaminathan and *A Jagannatha Rao*, for Defendant.

S Rajagopalan, for Commissioner.

The Court delivered the following

JUDGMENT.—The plaintiff has filed this suit for partition and allotment of his half-share, he being entitled to one half and the defendant the other half, in the property, Odeon Theatre, in Woods Road, Royapettah, Madras The plaintiff has set out in his plaint the reasons and the circumstances under which he was obliged to file the suit for partition.

The plaintiff has stated that the property is such that it is incapable of division by metes and bounds and that the proper way of effecting a just and fair partition of this property is to direct a sale of the property and divide the net sale-proceeds into two equal half-shares between the plaintiff and the defendant The defendant who is contesting the suit however, would not accept the stand taken up by the plaintiff that the property is incapable of division He would have it that the property could be conveniently and without prejudice to the rights of the parties divided into equal half shares. The further case of the defendant is that, in any event, if this Court should take the view that the only way of dividing the property is to direct a sale of the theatre outright, the plaintiff should be directed to sell his half-share to the defendant after determining the value of that half-share From the above, it will be seen that the main question that arises for decision in the suit is whether the property is capable of division by metes and bounds and whether the defendant has got a right to compel the plaintiff to sell his half-share on a valuation

With the view to assit the Court in determining whether the property is capable of convenient division, I appointed a Commissioner, and the Commissioner after inspection of the property has submitted a report I also made a local inspection of the theatre in the presence of learned Counsel for both sides I have made a record of the impressions which I had formed when I inspected the property It is

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*C.S. No. 85 of 1965. 13th October, 1966.

sufficient to state that the *prima facie* impression which I had formed and which I have recorded is that the property is not capable of division by metes and bounds.

While the suit of the plaintiff was getting ready for trial, learned Counsel for the plaintiff made an oral application, for reasons which it is unnecessary to consider in detail, that his client has decided to withdraw the suit and that permission may be granted to the plaintiff to withdraw the suit with liberty to institute a fresh suit. Learned Counsel for the defendant opposes this application on the ground that the right of the plaintiff, even though the suit is for partition, is not unqualified and unconditional, and that having regard to the nature of the contentions of the defendant, the plaintiff ought not to be permitted to withdraw the suit, but the Court should further proceed with the suit and consider the relief that could be granted to the defendant, with reference to his plea that the plaintiff's share should be directed to be sold to the defendant on valuation In support of his contention, Mr Govind Swaminathan drew my attention to the decision of a Bench of this Court in *Seethai Achi* v *Meyyappa Chetti*,[1] in which this Court had to consider the various restrictions or limitations on the right of a plaintiff to withdraw the suit In that case, while the suit was pending, a compromise was entered into between some of the parties and a third party, and the third party filed an application to implead him as a party to the suit for the purpose of working out the rights secured to him under the compromise While that application of the third party was pending, the plaintiff in that suit filed an application to withdraw the suit. The Bench of this Court held that, having regard to the peculiar facts of the case, in particular the rights which the third party claimed as having accrued to him as a result of the compromise, the plaintiff ought not to be permitted to withdraw the suit at that stage. It will be seen that the facts of that case, and the principle of that decision has no application. It is sufficient to refer to two decisions of this Court in which the facts were similar and in which the view was taken that the plaintiff would be at liberty to withdraw the suit In *Hasan Badhsa* v *Sultan Razia Begum*[2], the facts of the case were exactly similar to the instant case There too, the plaintiff had filed a suit for partition, and the defendant had invoked the provisions of Partition Act on the ground that the property was not capable of division At that stage, when the plaintiff filed an application to withdraw the suit, objection was raised by the defendant that because he had invoked the provisions of section 3 of the Act, the plaintiff ought not to be permitted to withdraw the suit at that stage This objection was overruled and the plaintiff was permitted to withdraw the suit, accepting the well-established rule that in a partition action till a preliminary decree has been passed the plaintiff is at liberty to withdraw the suit.

Learned Counsel for the plaintiff also drew my attention to a decision of Justice Madhavan Nair in *Santamma* v *Venkatarami Reddi*[3], in which the learned Judge has considered the particular incidents of a suit for partition and observed that so long as a preliminary decree has not been passed the plaintiff will have a right to withdraw the suit despite the opposition by the defendant It is unnecessary to burden the judgment with citation of further cases, and it is sufficient to refer to the judgment of Justice Pandalai in *Annamalai* v *Koothapudayar*[4], in which the learned Judge has considered in great detail all the relevant cases and applied the principle that, so long as a preliminary decree in a partition suit has not been passed, the plaintiff will be at liberty to withdraw the suit. The result, therefore, is that the plaintiff will undoubtedly have a right to withdraw the suit

The question next arises whether the plaintiff should have liberty to bring a fresh suit under Order 23 rule, 1, Civil Procedure Code So far as a suit for partition or a suit for redemption is concerned, it is axiomatic that, when the plaintiff withdraws his suit, he will be entitled to file a fresh suit as the cause of action is a recurring cause of action Even if the plaintiff is not granted permission, under Order 23 rule, 1, Civil Procedure Code, he will nevertheless have a right to file a suit for partition at any time he pleases. In view of this obvious right of the plaintiff,

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1. (1934) 66 M L J 517. I L.R. 57 Mad. 892.
2. (1949) 1 M.L.J. 515 : 62 L.W. 313.
3. (1935) 69 M L J 401 42 L W. 843.
4. 38 L W. 220. A.I.R. 1934 Mad. 485.

it has to be held that the plaintiff is entitled, particularly in terms of Order 23, rule 1, to bring a fresh suit

As the plaintiff is withdrawing the suit, the same is dismissed Having regard to the particular facts of the case, each party shall bear his own costs

M K — *Suit dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE M NATESAN.

K Palaniappa Moopan and others . *Appellants**

v.

Angammal and others .. *Respondents.*

Easement—Drainage rights—Existence of well-defined course or channel for 22 years—Prior course of the channel not to be considered—Several owners of servient lands—If necessary parties in the absence of allegation of obstruction by them

It was found by the trial as well as the first appellate Court that the surplus irrigation water on the plaintiff's lands flowed in a well-defined course over the Government poramboke and then drained through a well-defined channel on the lands of the defendants and some others and the channel was in existence for the past 22 years though the position was a little different previously The case that user was permissive on payment was also found against

The obstruction according to the plaint was only by the defendants-appellants herein and not the other servient owners

Held When long user is established the presumption is that it is as of right until the contrary is proved The plea of permissive user having been found against, the conclusion of the Courts below,—fully in consonance with the evidence and material on record—cannot be impeached in Second Appeal

The owners of other servient lands are not necessary parties to the suit

It is by consent that the Commissioner's report and plans had been taken as evidence The objection that trial Court itself should have appointed the Commission and consider his plans and reports is without substance

No right could be claimed on the basis of the course of drainage as it existed prior to the said period of 22 years

Appeal against the Decree of the Sub-Court, Salem, in A S No 110 of 1959, preferred against the decree of the District Munsif, Namakkal, in O S No 706 of 1956

T. K Subramania Pillai, S Vaidyalingam and *R N Kothandaraman*, for Appellant.

M S Venkatarama Ayyar and *V Krishnan*, for Respondents

The Court delivered the following

JUDGMENT.—This Second Appeal is by the defendants who have lost in both Courts below and the question involved is as to the right of drainage of irrigation water Plaintiffs 1 to 3 are stated to be owners of adjoining fields, S No. 290 of Mohanur village and S No 8/4-C of Pettapalayam village, Salem district, the fourth defendant being the lessee of the said lands for a period They claim that for several decades the surplus water from these fields was drained into field S. No. 17 poramboke, through a defined channel and then it flowed over the defendants' lands and onwards over lands of others in a defined channel till it ultimately fell into the Cauveri river The cause of action for the suit is obstruction by the defendants to the usual flow of the surplus water over their fields, leading to the stagnation of the water on the plaintiffs' lands and consequential damage to crops In the body of the original plaint, fields of the defendants over which the water flowed had not been indicated but there was a plan attached Later the plaint was amended to show that the surplus water from the suit lands, first flowed into survey field S No 17, then over to the defendants' fields S Nos 11,13, 14 and 16, then over survey field S No 15, belonging to a third party and finally it reached the river The defendants denied the right of drainage claimed by the plaintiff The existence of a permanent drain channel was refuted and it was stated that the water used to be drained through defendants' lands only with permission and on payment of compensation without causing inconvenience or damage to the defendants. S No 17 through which the surplus water of the plaintiff first flowed

* S A. No. 1265 of 1962. 5th August, 1966.

is burial ground poramboke and the defendants denied their questioning the plaintiffs' right if any to drain the surplus water into S. No 17 The case has had a chequered career From the decree in favour of the plaintiff by the trial Court, there was an appeal and in the appeal, the suit was remanded The order of remand was challenged in this Court and this Court set aside the order of remand while providing for a finding being submitted by the trial Court on the additional issue on the question whether there was a defined drainage channel over the survey fields S Nos 11, 13, 14 and 15, in continuation of a channel in S No 17 The finding was in favour of the plaintiffs and the appellate Court in the judgment now under appeal on a full re-appraisal of the evidence has accepted the finding and held that the plaintiffs have been draining their surplus irrigation water along a definite channel which originally ran through S Nos 11, 13 and 14 and had subsequently been diverted into S Nos 16 and 14 P W 3, the Karnam of the village, has stated that the channel's course has been shifted slightly to the north from its original position so that the channel now flowed over S Nos 16 and 14 before it entered S No 15 According to the Karnam, the channel has been in its present position for over 22 years, and it had a defined course in S No 17. The defendants' case of permissive user and of an agreement to pay compensation for the channel over their fields has been found against and the first defendant has admitted that he had occasionally shifted the position of the channel He was about 75 years old when he gave evidence and he has deposed that the surplus water from the plaintiffs' land was being drawn along the channel through his land on payment of compensation Long user of the channel as indicated in the plan Exhibit B-9 was found proved and established and the lower appellate Court has now held that there is a drainage channel in S Nos 16 and 14, that is, in the fields now owned by the defendants in continuation of a channel in S No 17 poramboke and that the plaintiffs have got a right to drain the water from their lands bearing S No 290 and S No 8/4-C Where long user is established, the presumption is that it is as of right until the contrary is proved In the present case, the plea of permissive user on payment of compensation has been found against This conclusion of the Courts below fully in consonance with the evidence and the state of things on the land as seen from the records cannot be impeached in Second Appeal

However learned Counsel takes exception to the decision on grounds while challenging the finding otherwise also The first contention is that the suit as framed is not maintainable as no effective relief could be granted to the plaintiffs without the State of Madras, the owner of the poramboke field S No 17 and the owners of the fields lower down, S. No 15 and other fields, being party defendants in the suit I see no force in this objection. It may be that the owners of other fields over which the channel flows are proper parties, but certainly they are not necessary parties Their non-joinder cannot be fatal to the suit There are several servient tenements over which the channel passes, but the defendants alone have obstructed according to the plaintiffs There has been no obstruction from the State or from the owner of field S. No. 15 of the exercise of the right claimed by the plaintiffs. I am unable to appreciate the contention that the plaintiffs cannot have effectual relief in their absence. If any of them should interfere with the *mamool* flow of water or at any subsequent period, that would give a fresh cause of action to the plaintiffs and a cause of action to the defendants also if they are inconvenienced and injured In my view, it would be unreasonable to compel the plaintiffs to implead the owners of the servient lands all along the course of the channel whether they had any cause of action against them or not and even though there was no obstuction to or denial of the plaintiffs right by these persons.

It is next contended that the lower appellate Court erred in relying upon the Commissioner's Report and plan obtained at an earlier stage in the appeal, that is, before the order of remand which was set aside Learned Counsel submits that the trial Court itself should have appointed a Commissioner and considered this report and pleas. This objection again is without substance and it is recorded by the lower appellate Court that at the time of the arguments in the appeal learned

Counsel appearing in the case agreed that the appellate Court would mark the Commissioner's report and plans and then dispose of the case It is by consent that the Commissioner's Report and plans had been taken as evidence in the case.

The third objection has been taken is that the plaint is vague in regard to the course of the channel and its measurements No doubt, the plaint does not give the depth and the width of the channel But the Commissioner has given the necessary details regarding the measurements and the size of the channel on the land in his report which is marked as Exhibit B-8 This is specifically pointed out by the learned Subordinate Judge. It is then argued that whereas the channel was originally shown in S Nos 11 and 13, rights are now claimed to take the channel over S Nos 14 and 16 But this is the course which the channel has taken for over 22 years according to P W 3 A reference to the plan would show that the channel has been shifted slightly to the north of S Nos 11 and 13 to make it flow about the boundary line between S Nos 11 and 16 and S Nos 14 and 13 a little to the north, before it flowed into S No 15 D W 1 has stated that he used to shift the position of the channel, and it may be that the servient owner has some two decades back minimised the inconvenience to himself by slightly varying the course and this has been acquiesced in by the plaintiffs The plaintiffs claimed relief for the channel which has been running through the defendants' lands and the channel has now been clearly demarcated by the Commissioner in his plan Exhibit B-9 But the decree as drafted provides for the drainage course to run through S Nos 11, 13, 14 and 16 This is obviously incorrect and cannot stand. The channel is found to flow only over S Nos 16 and 14, before it enters S No 15. The plaintiffs cannot have a right to take the channel in the circumstances over S Nos 11 and 13 also The decree therefore will have to be amended and the latter part of clause (1) of the decree after the words in bracket " (S No 290 of Mohanur village and S No 8/4-C of Pettapalayam village)" should read " through the drainage course in S No 17 of Pettapalayam village and from there through S Nos 16 and 14 as shown in the Commissioner's plan Exhibit B-9"

Subject to the variation of the decree as above indicated, the judgment and decree of the Courts below are confirmed and the Second Appeal dismissed. In the circumstances, the parties will bear their respective costs throughout No leave

K G S ——— *Decree modified, Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR JUSTICE K VEERASWAMI AND MR JUSTICE M NATESAN.

N Krishnaraju Reddiar and others ... *Petitioners**

v

The Authorised Officer, Land Reforms, Vellore and others . *Respondents.*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961)—*Validity after the coming into force of the Constitution (Seventeenth) Amendment) Act,* 1964—*Legislative competency—Falls within the ambit of Entry* 18 *of List II and Entry* 42 *of List III of the Seventh Schedule to the Constitution of India.*

Constitution of India (1950) (*as amended by the Constitution (Seventeenth Amendment) Act,* 1964), *Article* 31-*B—Scope and effect*

The Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) has become a valid piece of legislation from its inception after it has been included in the Ninth Schedule to the Constitution of India by the Constitution (Seventeenth Amendment) Act, 1964

The argument that Madras Act (LVIII of 1961) having been struck down as invalid by the Supreme Court in *Krishnaswami* v *State of Madras*, (1965) 1 S C J 239, it is *non est* and void *ab initio* and that therefore Article 31-B of the Constitution of India does not help to validate it without a separate validating Act passed by the Madras Legislature, is untenable It is no doubt true that where an Act is incompetent either because it violates any of the fundamental rights or there is lack of power

* W.P Nos 1543 of 1964, 416 and 1473 of 1965 29th July, 1966

under the relative Legislative Entry, the Act is void *ab initio* and can have no force from the very inception Such an Act in either case is still-born If by subsequent amendment of the Constitution the required legislative power is conferred or the Constitutional limitation in relating to the fundamental rights is lifted that will not *ipso jure* have the effect of reviving the still-born Act. But it is open to the constituent power, which is supreme, to expressly validate a law hit by Article 13 (2) of the Constitution by removing the prohibition specifically with reference to such law If a law in the teeth of a constitutional prohibition is invalid from its inception, there can be no valid objection to the constituent power lifting the prohibition retrospectively and providing that the law should not be deemed to be void by reason of the prohibition thereby reviving and validating the law right through That is what Article 31-B does Article 31-B is not therefore merely a subsequent amendment of the Constitution removing with retrospective effect the ban or prohibition under Article 13 (2) but is itself expressly validating the Acts and Regulations specified in the Ninth Schedule to the Constitution

The argument that Article 31-B on a proper interpretation does not save the impugned Act (Madras Act LVIII of 1961) on the ground that the language employed by Article 31-B is not appropriate to cover Acts and Regulations which were void *ab initio*, is equally untenable The Article on the face of it, having regard to its language, the object and the circumstances in which it was introduced and the defects it sought to rectify, is clearly retrospective in its operation The intention of the Article is to revive and validate both Acts and Regulations which fall within the purview of clauses (1) and (2) of Article 13 of the Constitution of India and the language of Aricle 31-B quite clearly and appropriately gives effect to that intention

Nor has the argument any force that Article 31-B makes a distinction between those Acts and Regulations which violate the provisions of Part III of the Constitution of India but not struck down and those struck down by Courts and that in the latter case it does not give to such Acts and Regulations life retrospectively There is no such dichotomy in the Article and the validation of the Acts and Regulations is not confined to those Acts and Regulations not struck down by Courts but extends to all Acts and Regulations specified in the Ninth Schedule to the Constitution

The contention that inasmuch as Article 31-B validates only the Acts and Regulations specified in the Ninth Schedule, in the absence of a clause saving actions taken and things done, the rules made under the impugned Act are not saved, is equally without force When the effect of Article 31-B is that the Acts and Regulations specified in the Ninth Schedule should be taken to have been always valid, the natural consequence will be that the rules made thereunder also get automatically validated

The impugned Act cannot also be struck down as incompetent for want of legislative power The pith and substance of the Act are to take a further step in the agrarian reform and solve the problem of concentration of agricultural lands The Act, therefore, provides for ceiling of agricultural holdings and necessarily, for acquisition of surplus over the ceiling area and for distribution of such surplus to tenants or the landless, among the agricultural population That clearly falls within the ambit of " land, rights in or over land " in Entry 18 of List II The Entry should be read as liberally and as widely as possible and should be taken to include all incidental and ancillary matters If the Entry merely used the expression " land ", it is obvious that it would be impossible to contend that the impugned Act is not within its ambit The wide amplitude of the word " land " is not narrowed down by the words following it, namely, " that is to say " These words are merely illustrative and not restrictive or limitative In any case " rights in or over land " in the Entry are comprehensive enough to include a legislation which fixes a ceiling on agricultural holding and provides for acquisition of the surplus and distribution of the same to the landless

It cannot be contended that to be valid under Entry 18 of List II the legislation should do no more than adjustment of the rights and liabilities as between landlord and tenant—curtailing the rights of the landlord and correspondingly increasing the rights of the tenant

The impugned Act will also fall within the ambit of Entry 42, List III

Thus the Madras Land Reforms (Fixation of Ceiling on Land) Act 1961, is within the competency of the State Legislature under Entry 18 of List II and Entry 42 of List III of the Seventh Schedule to the Constitution of India (1950)

It cannot be said that the Authorised Officer has no power to decide questions of title under Madras Act LVIII of 1961 Section 11 provides for it in certain cases

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the respondents to forbear from taking any proceedings against the petitioner and the lands set out in the schedule attached to the petitioner's affidavit filed therewith under the provisions of Madras Act LVIII of 1961, etc

V. Vedantachari, T. Rangaswami Iyengar, K C Rajappa, and *K K. Venugopal,* for Petitioners,

The Advocate-General and *K. Venkataswami* for the Additional Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J—In a batch of writ petitions, which we have heard, the constitutionality of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 is assailed on certain grounds, notwithstanding the fact that it was included in the Ninth Schedule to the Constitution of India by the Seventeenth Amendment Further, the scope and effect of some of the provisions of the Act as applicable to particular facts in each case, have to be decided Though for convenience's sake, the batch of petitions was heard together on the validity of the Act, on the second question of interpretation we propose to deal with these petitions separately, in the light of the facts in each of them We shall at the moment confine ouselves to W P Nos 1543 of 1964 and 416 and 1473 of 1965. The first of them is for *mandamus* directing the Authorised Officer, Land Reforms, Vellore and the State of Madras to forbear from taking proceedings against the petitioner and the lands set out in the schedule attached to his affidavit in support of the petition under the provisions of the Act In compliance with a notice served on him, the petitioner filed a return on 25th December, 1962 in which he disclosed the members of his family including his minor sons and unmarried daughters, an extent of 185-47 acres as lands deemed to have been held by him at the date of the commencement of the Act On 6th April, 1962, he has executed a settlement deed in favour of his wife making a gift to her of an extent of 78-47½ acres at Bodinayakanpatti and on 27th March, 1963, there was a family arrangement in respect of all the lands belonging to the family at which 35 acres 58 cents were allotted to the petitioner's share, 34-31 acres to his minor son Manimalan and 34-32 acres to another minor son of his by name Ravichandran On 25th March, 1964, the petitioner's wife exectued a gift deed settling 39 acres on her three minor daughters On 9th February, 1962, the petitioner had executed a sale in favour of one Periaswami Goundar conveying 7 acres 25 cents in Namakkal taluk in Salem district The Authorised Officer, after summoning the evidence from the petitioner, held an enquiry and eventually found, according to the petitioner, that the sale deed dated 9th February, 1962 and the settlement deed dated 6th April, 1962 were void The petitioner maintains that the Authorised Officer had no jurisdiction to do so and that the Act itself is invalid Though in the affidavit in support of the petition, various grounds based on fundamental rights have been raised, actually at the hearing, the attack on the validity of the Act was not based on violation of fundamental rights of the petitioner evidently because of the bar under Article 31-B of the Constitution but was confined to certain other grounds claimed to be still available to the petitioner which we shall refer to presently The petitioner says that by reason of the provisions of the Act, treating the total extent of the properties covered by various transactions aforementioned has been owned by a single family, the petitioner, his wife, his sons and daughters are required to part with a substantial portion of their properties The respondents counter the attack mainly on the basis of the protection afforded to the Act by Articles 31-A and 31-B of the Constitution as amended by the Seventeenth Amendment in 1964 They deny that the Act is open to any challenge on any ground

The challenge to the validity of the Act is on the following grounds· (1) The Act having been struck down as invalid by the Supreme Court in *Krishnaswami* v *State of Madras*[1], it is *non est* and is void *ab initio*, and Article 31-B does not help to validate it without a separate validating Act passed by the Madras Legislature; and (2) the Act is incompetent for want of legislative power

We shall notice the provisions of the impugned Act in some detail when we deal with the second ground Briefly, the Act fixes a ceiling on agricultural land holdings in the State of Madras and provides for acquisition of such land in excess of the ceiling, and distribution of the lands so acquired to the landless and other persons among the rural population The Act is pursuant to the directive policy contained in Article 39 (*a*) and (*b*) of the Constitution and has been enacted to do

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1. (1965) 1 M.L.J. (S.C.) 14 : (1965) 1 An W R. 82; A.I.R. 1964 S.C. 1515, (S.C.) 14 : (1965) 1 S.C.J. 239 : (1964) 7 S.C.R.

away with the great disparity in the ownership of agricultural land leading to the concentration of such land in the hands of a few persons and to distribute the agricultural land in such a way as will best subserve the common good, increase agricultural production and promote justice, social and economic The Bill, which was published on 6th April, 1960, was introduced in the Legislative Assembly of this State on 14th April, 1960 After its passage through the Legislature and the assent of the Persident, the Act was published in the *Fort St George Gazette*. It provided that it was to come into force from the date of the publication of the Bill On 2nd October, 1962, there was a notification under section 8 of the Act relating to the furnishing of returns by person holding lands in excess of ceiling area On 9th March, 1964, in *Krishnaswami* v. *State of Madras*[1], the Supreme Court struck down the entire Act because sections 5 and 50 of the Act violated Article 14 of the Constitution On 20th June, 1964, the Parliament in exercise of its constituent power passed the Constitution (Seventeenth Amendment) Act, 1964 including the Act in the Ninth Schedule to the Constitution The validity of this amendment was questioned on certain grounds in *Sajjan Singh* v *State of Rajasthan*[2], but the contention was rejected on 30th October, 1964 Articles 31-A and 31-B were first inserted in the Constitution by the Constitution (First Amendment) Act, 1951, the first intended to save laws providing for the acquisition of estates and the other for validation of the Acts and Regulations specified in the Ninth Schedule to the Constitution, notwithstanding the fact that they were in violation of one or more of the provisions of Part III of the Constitution The history and the circumstances in which these two Articles came to be inserted are well known and have been reiterated by Courts more than once and it will suffice to refer to *Sajjan Singh* v *State of Rajasthan*[2] The laws giving effect to the policy of agrarian reform and abolition of Zamindaries were declared to be unconstitutional in some of the States but held valid in others in about 1951 and there were appeals pending in the Supreme Court regarding the matter The First Amendment to the Constitution was, therefore, made inserting the two Articles which afforded protection to certain laws whose main object was to bring about agrarian reform But the protection so afforded was limited to an attack based on the provisions of Part III of the Constitution In 1955 came the Fourth Amendment to the Constitution somewhat widening the scope of Article 31-A and extending the protection to a larger area In *K Kunhikoman* v *State of Kerala*[3], the Kerala Agrarian Relations Act, 1961 was struck down as unconstitutional and, as we mentioned, the present impugned Act was similarly struck down in *Krishnaswami* v. *State of Madras*[1] Measures providing for agricultural land ceiling and distribution of excess lands in certain other States were also under challenge And so by the Seventeenth Amendment, forty-four enactments in different States of which the impugned Act is one were inserted in the Ninth Schedule to the Constitution and were placed within the purview of Article 31-B Article 13 (1) renders pre-Constitution laws void to the extent of their inconsistency with the provisions of Part III of the Constitution and clause (2) of the Article, by using similar phraseology, declares that they shall be invalid to the extent they take away or abridge the rights conferred by that Part Article 31-B aims at saving the Acts and Regulations specified in the Ninth Schedule notwithstanding their violation of the provisions of Part III and thus validating the Acts and Regulations, enabling them to continue in force notwithstanding any judgment, decrees or order of any Court or tribunal to the contrary.

Sri Vedantachari for some of the petitioners, whose leading argument has been adopted by the rest of the petitioners, contends that the impugned Act, a post-Constitution law, to which Article 13 (2) applies, was void *ab initio* and was, therefore, still-born because it took away or abridged the rights conferred by Part III and contravened Article 13 (2) and that such an Act is not validated by a subsequent Amendment to the Constitution removing the constitutional limitation The

1 (1965) I M L J (S C) 14 · (1965) 1 An W.R. (S C) 14 · (1965) 1 S C J 239 · (1964) 7 S C.R 82 · A I R 1964 S C 1515

2. (1965) 1 S C J. 377 · A.I R 1965 S C 845

3 (1962) 1 S C J 510 (1962) 1 An W R (S C) 213 · (1962) 1 M L J (S C) 213 A I.R. 1962 S.C. 723.

principle of the argument is undoubtedly correct and is supported by *Deep Chand* v *State of Uttar Pradesh*[1] Where an Act of a Legislature is incompetent either because it violates any of the fundamental rights under Part III or there is lack of power under the relative Legislative Entry, the Act is void *ab initio* and can have no force from the very inception Such an Act in either case is still-born If, by subsequent amendment of the Constitution, the required legislative power is conferred or the constitutional limitation in relation to the fundamental rights is lifted, that will not *ipso jure* have the effect of reviving the still-born Act The majority judgment of the Supreme Court in *Deep Chand* v. *State of Uttar Pradesh*[1] observed.

" The validity of a statute is to be tested by the constitutional power of a Legislature at the time of its enactment by that Legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid without re-enactment, if later by constitutional amendment, the necessary legislative power is granted ' An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted ' "

For the purposes of this test, as held in that case, it makes no difference to the legislative power whether it is in relation to the lack of it under the relative legislative list or a limitation upon the legislative power in the form of fundamental rights, since both represent only two aspects of want of legislative power. Though there may be legislative power to enact a particular law, still if it is in contravention of the fundamental rights, the effect of Article 13 (2) upon such law has been stated thus by the Supreme Court at page 656

" A plain reading of the clause indicates without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law , the law made in spite of the prohibition is a still-born law "

The earlier decisions were considered and in the light of the discussion with reference to them, the Supreme Court summarised the resultant propositions at page 664;

" (i) whether the Constitution affirmatively confers power on the legislature to make laws subjectwise or negatively prohibits if from infringing any fundamental right, they represent only two aspects of want of legislative power, (ii) the Constitution in express terms makes the power of a Legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution , (iii) it follows from the premises that a law made in derogation or in excess of that power would be *ab initio* void wholly or to the extent of the contravention as the case may be , and (iv) the doctrine of eclipse can be invoked only in the case of a law valid when made, but a shadow is cast on it by supervening constitutional inconsistency or supervening existing statutory inconsistency , when the shadow is removed, the impugned Act is free from all blemish or infirmity "

The last proposition applies to pre-Constitution laws which fall within the purview of Article 13 (1) This view of the Supreme Court that no distinction can be made between a post-Constitution law beyond the legislative competence and a law in violation of fundamental rights for purposes of Article 13 (2), that in either case the law will be invalid *ab initio* and that a subsequent amendment of the Constitution supplying the power or removing the ban cannot automatically revive such law finds affirmance in *Mahendra Lal* v *State of Uttar Pradesh* [2]

But is it not open to the constituent power which is supreme, to expressly validate a law hit by Article 13 (2) of the Constitution by removing the prohibition specifically with reference to such law? In our opinion, the answer must be in the affirmative If a law in the teeth of a constitutional prohibition is invalid from its inception, we can see no valid objection to the constituent power lifting the prohibition retrospectively and providing that the law should not be deemed to be void by reason of the prohibition, thereby reviving and validating the law right through That is what Article 31-B does In terms it says that none of the Acts and Regulations specified in the Ninth Schedule shall be deemed to be void or ever to have become void on the ground that such Acts or Regulations are inconsistent with or take away or abridge any of the rights conferred by any provisions of Part III. The Article further provides that such Acts and Regulations shall continue in force notwithstanding any judgment, decree or order of a Court or Tribunal to the contrary subject of course to the power of the competent Legislature to repeal or amend

1. (1959) S C J 1069 (1959) 2 S.C.R. (Sup) 8 : A.I.R. 1959 S C. 648, 657.

2. (1963) 1 S.C.R. (Supp.) 560 A.I R. 1963 S.C. 1019.

them Article 31-B is not, therefore, merely a subsequent Amendment of the Constitution removing with retrospective effect the ban or prohibition under Article 13 (2) but is itself expressly validating the Acts and Regulations specified in the Ninth Schedule, notwithstanding the prohibition and declaring that they shall continue in force *Deep Chand* v *State of Uttar Pradesh*[1], does not therefore, assist the petitioners The validity of the Seventeenth Amendment to the Constitution was attacked in the Supreme Court in *Sajjan Singh* v *State of Rajasthan*[2], on the ground that its true purpose and object was to legislate in respect of land and the subject fell within the jurisdiction of State Legislature and that the Parliament had no power to legislate in respect of land The argument was also presented in another form and in the light of the scheme of Articles 245 and 246 of the Constitution In repelling the contention, the Supreme Court held

> " What the impugned Act purports to do is not to make any land legislation but to protect and validate the legislative measures in respect of agrarian reforms passed by the different State Legislatures in the country by granting them immunity from attack based on the plea that they contravene fundamental rights Parliament, in enacting the impugned Act, was not making any provisions of land legislation It was merely validating land legislations already passed by the State Legislatures in that behalf "

Likewise another argument of the petitioners is also met by this decision It held that the Seventeenth Amendment does not in substance purport to set aside the decisions of Courts of competent jurisdiction by which some of the Acts added to the Ninth Schedule had been declared to be invalid and that the constituent power conferred by Article 368 on the Parliament could be exercised both prospectively and retrospectively The Seventeenth Amendment is obviously retrospective in its effect and it has that effect notwithstanding the decisions of Courts

It is next contended that Article 31-B, on a proper interpretation of its terms, does not save the impugned Act It is stated that the language employed by the Article is not appropriate to cover Acts and Regulations which were void *ab initio* and the Article is not retrospective in its operation so as to validate such Acts and Regulations Reliance is placed in support of the construction on the words " ever to have become void " and it is contended that they signified Acts and Regulations which were valid at inception but became void at a subsequent stage on the ground that they were inconsistent with or took away or abridged any of the rights under Part III of the Constitution It is further argued that the use of the words " continue in force " in the concluding part of the Article also supports that view We are unable to accept the contention The Article on the face of it, having regard to its language, the object, and the circumstances in which it was introduced and the defects it sought to rectify, is clearly, in our opinion, retrospective in its operation The words " ever to have become void " make it clear beyond doubt that this is the effect of the Article. The same effect is conveyed also by the words " none of the Acts and Regulations... . . shall be deemed to be void...." The intention of the Article is to revive and validate both Acts and Regulations which fall within the purview of clauses (1) and (2) of Article 13 and, in our view, the language of Article 31-B quite clearly and appropriately gives effect to that intention Sri Venugopal for some of the petitioners contends that the Article in dealing with the Acts added to the Ninth Schedule makes a difference between those which violate the provisions of Part III but not struck down by Courts and Acts struck down by Courts and that in the latter case it does not give to such Acts life retrospectively. According to learned Counsel, this is clear from the phraseology " continue in force " which is suggestive of only a future effect. This contention also, as it seems to us, is unsound In our opinion, there is no such dichotomy in the Article, and the Acts and Regulations referred to in the first part of the Article are comprehensive and there is no reason to think that they do not include also those struck down by Courts The first part of the Article saves and validates both pre and post-Constitution Acts and Regulations and the second part of the Article specifically referring to struck down Acts is only by way of abundant caution and to make it

1. (1959) S C J. 1069: (1959) 2 S.C R. (Sup) 8: A.I.R. 1959 S.C. 648.
2. (1965) 1 S C J. 377: A I R. 1965 S C. 845, 853.

plain that if some of the Acts and Regulations specified in the Ninth Schedule happened to have been struck down by Courts, they would nevertheless continue in force, but such continuance in force is by reason of the validation of those Acts and Regulations made by the first part of the Article The validation of Acts and Regulations is not confined in our opinion, to those Acts and Regulations not struck down but extends to all Acts and Regulations specified in the Ninth Schedule In any event, says Sri Venugopal, inasmuch as the Article validates only the Acts and Regulations specified in the Ninth Schedule, in the absence of a clause saving actions taken and things done, the Rules made under the impugned Act are not saved and validated We are not impressed by this argument as well When the effect of the Article is that the Acts and Regulations specified in the Ninth Schedule should be taken to have been always valid, the natural consequence will be that the Rules made thereunder also get automatically validated We cannot say that when the Acts were valid from inception, they were nevertheless not so when the Rules were made thereunder It is true that this construction might possibly lead to certain hardships, inconvenience and perhaps even absurdities The Act creates offences for its purpose, provides for limitations in certain cases and attaches liabilities But we dare say that those, who are charged with the duties of administering the Act, will take due note of the factual position and the circumstances in which the impugned Act was validated and not act unreasonably in prosecuting for offences supposed to have been committed before the Act was validated by the constitutional amendment or insisting upon limitation or pursuing liabilities for the period prior to the validation. No doubt, Courts, if possible, avoid a construction which will lead to such an unenviable position. But it is equally clear that when Article 31-B clearly retrospective and validates the impugned Act from its inception, we cannot imagine that it was invalid when Rules thereunder were made.

We pass on to a consideration of the question of legislative competency to make the impugned Act Sri Vedantachari contends that it will fall neither under Entry 18 of List II nor under Entry 42 of List III of the Seventh Schedule to the Constitution. On the other hand, the learned Advocate-General maintains just to the contrary and says that both the Entries read together provide necessary power for the State Legislature to enact the impugned Act Before we deal with this contention, the main provisions of the Act should be noticed We have already given the outlines of it As we said, its primary object is to give effect to the directive principles contained in Article 39 (*b*) and (*c*) of the Constitution and to do away with concentration of agricultural holding, to acquire the surplus agricultural land and distribute the same among the landless and other persons among the rural population. The concentration of agricultural land cannot be tackled without fixing a ceiling and ceiling necessarily leads to acquisition of the excess over the ceiling area and distribution of the same. The Act contains fourteen chapters Chapter I deals with preliminary matters including definitions, Chapter II with fixation of ceiling on land holdings. Chapter III with ceiling on future acquisition and restriction on certain transfers, Chapter VI with compensation for the excess land acquired, Chapter VIII with cultivating tenant's ceiling area, Chapter IX with exemptions and Chapter XIII with disposal of land acquired The rest of the Chapter relates to the constitution of the Land Board, Sugar Factory Board and miscellaneous matters Section 3 defines, among others, ceiling area, cultivating tenant, family, owner, person and standard acre. The definition of 'family' is quite artificial and means in relation to a person the wife or husband, as the case may be of such person and also his or her minor sons, unmarried daughters and minor grandsons and unmarried grand-daughters in the male line, whose father and mother are dead But in regard to persons governed by Hindu Law, family will not include 'minor sons' minor grandsons between whom and the other members of the family, a partition by means of a registered instrument has taken place or in respect of whose family properties, a preliminary decree for partition has been passed before the date of the commencement of the Act By 'owner' is meant any person holding land in severalty or jointly or in common under a ryotwari settlement or in any way subject to the payment of revenue direct to the

Government, landholder as defined in the Madras Estates Land Act, 1908, or a ryot as defined in that Act or an inamdar not being a landholder as aforesaid means and includes full owner or limited owner the lessee of any lease-hold village or his heirs assignees, legal representatives or persons deriving rights through him 'Person' is defined to include any trust, company, family, firm society or association of individuals, whether incorporated or not 'Standard acre' is defined as so much area dependent upon the character of the land and the quantum of land revenue pertaining thereto 'Surplus land' means the land held by a person in excess of the ceiling area and declared to be surplus by or under the provisions of the Act. The term 'tenant' also has been defined. Section 5 fixes the ceiling area for a person or a family In the case of a person, the ceiling area, subject to the other provisions of the Act, shall be 30 standard acres and in the case of every family consisting of not more than five members, it shall be a similar extent. If the family consists of more members than five, an additional five standard acres is allowed for every member of the family in excess of five For the purpose of the section, all lands held individually by the members of the family or jointly by some or by all of the members of such family shall be deemed to be held by the family In calculating the extent held by a member of a family or by an individual person, the share of the member of the family or of the individual person in the land held by an undivided Hindu family, a Marumakkattayam tarward, an Aliyasanthana family or a Nambudiri Illom shall be taken into account; in calculating the extent of land held by a family or by an individual, the share of the family or of the individual person in the land held by a firm, society or association of individuals or by a company shall be taken into account Where the stridhana land held by any female member of a family together with the other land held by all the members of that family, is in excess of 30 standard acres, the female member concerned may hold, in addition to the extent of land which the family is entitled to hold under sub-section (1), stridhana land not exceeding 10 standard acres There are further provisions in this regard Section 6 provides for basis of calculation of the extent of land held by a founder of a trust Section 7 directs that on and from the date of the commencement of the Act, no person shall, except as otherwise provided in the Act, but subject to the provisions of Chapter VIII be entitled to hold in excess of the ceiling area Section 8 requires furnishing of returns in the prescribed form and containing the particulars on certain specified matters. Section 11 authorises an Authorised Officer to decide questions of title in certain cases and under section 12, after the disposal of objections, a final statement is published specifying therein the entire land held by a person, the land to be retained by him within the ceiling area and the land declared to be surplus land and such other particulars as may be prescribed The Authorised Officer shall serve a copy of the statement on the persons concerned which shall be conclusive of the facts stated therein Provisions are made for amendment of the final statement in certain cases and for power to rectify *bona fide* mistakes and clerical errors. Section 16 deals with reverter of possession within the limits to the possessory mortgagor in certain cases from the possessory mortgagee for purposes of ceiling Section 18 deals with acquisition of surplus land and says that after the publication of the final statement under section 12 or 14, the Government shall publish a notification to the effect that the surplus land is required for a public purpose Sub-section (3) of the section is to the effect that on the publication of the notification under sub-section (1), the land specified in the notification together with the trees standing on such land and buildings, machinery, plant or apparatus constructed, erected or fixed on such land and used for agricultural purposes shall, subject to the provisions of the Act, be deemed to have been acquired for a public purpose and vested in the Government free from all encumbrances with effect from the date of such publication and all right, title and interest of all persons in such land shall, with effect from the said date, be deemed to have been extinguished Sub-section (4) enables the Authorised Officer to take possession of any land notified in sub-section (1) Sections 19 to 23 contain provisions regarding ceiling on future acquisition and restriction on certain transfers as well as penalties for contravention Section 50 is concerned with determination of compensation for land acquired by the Government. Sub-section (1)

of that section says that every person whose right, title or interest in any land is acquired by the Government shall be paid compensation according to the rate specified in Schedule III. The rest of the section provides for the procedure to be followed in determining compensation Section 51 delas with claims of mortgagee or charge holder on surplus land and section 52 with claims of limited owner on surplus land Sections 53 and 54 deal with claims of maintenance-holder on surplus land and compensation to certain tenants. Section 55 deals with mode of payment of compensation. Under the Chapter relating to the cultivating tenant's ceiling area, the principle of ceiling is applied to cultivating tenants as defined in the Act. Section 61 provides that every cultivating tenant who holds on the notified date land in excess of the cultivating tenant's ceiling area should within ninety days from the said date of notification furnish a return containing the required particulars; and the ceiling area for a cultivating tenant held partly as cultivating tenant and partly as owner or wholly as cultivating tenant The excess of the ceiling area is taken by the Authorised Officer who is required to distribute possession of such land to the landless persons or to persons holding land below the cultivating tenant's ceiling area. Compensation is also provided by section 66 to tenants in certain cases Under section 94, the Government is empowered to make Rules after taking into consideration the objects specified in the Preamble to the Act providing for the manner in which the lands acquired by the Government under the Act should be disposed of The Rules so made are required to be placed before the Legislature for its approval. Sub-section (2) of section 94 contains certain principles for preference in certain cases in the matter of distribution of the land acquired by the Government Section 110 contains the power for the Government to make Rules and Regulations specifically in the specified manner Schedule III to the Act provides for payment of compensation for land acquired by the Government under the Act and the form of compensation will be multiples of the net annual income on slab basis. Rules made by the Government for disposal of lands contain certain guiding principles in the matter.

The argument of Sri Vedantachari is that the Act is not a legislation on land or rights in or over land He says that Entry 18 in List II is of a limited scope and the essence of it is conservation of property Learned Counsel argues that under the Entry you can limit and not destroy rights. According to him, ceiling necessarily implies distribution involving destruction of rights His contention is that you can legislate over one or more components of rights but not dispose of the entirety of the rights under the guise of land ceiling The substance of the power under Entry 18, says Sri Vedantachari, is related to the relationship of landlord and tenant and the adjustment thereof. He concedes that there may be ceiling but he would say that it should be short of deprivation and should be only in the course of adjust ments of rights and liabilities as between landlord and tenant He adds that though " land " by itself is very comprehensive and very wide by itself, the words " that is to say " limit the scope of land to what is enumerated following the words " that is to say ". " Rights in or over land," according to learned Counsel, should be understood as relatable to those that go with the relationship of landlord and tenant and land tenures

In deciding whether an Act is within the ambit of a legislative Entry, we have first to see what the pith and substance of that Act are and bear in mind the broad principle of construction of heads of power in an organic law The pith and substance of the impugned Act are to take a further step in the agrarian reform and solve the problem of concentration of agricultural lands The Act, therefore, provides for ceiling of agricultural holdings and necessarily, therefore, for acquisition of surplus over the ceiling area and for distribution of such surplus to tenants or landless among the agricultural population That clearly falls within the ambit of land, rights in or over land in Entry 18 The Entry should be read as liberally and as widely as possible and should be taken to include all incidental and ancillary matters If the Entry merely used the expression ' land,' it is obvious that it would be impossible to contend that the impugned Act is not within its ambit But it is contended that the wide amplitude of the word ' land ' is narrowed down by the

words following 'land' and principally by the words "that is to say", the effect of which, according to learned Counsel, is to restrict the scope We are unable to take this view. It is true that Bhagwati, J, as he then was, in *Tan Bug Taim* v *Collector of Bombay*[1], construing the words "that is to say" was inclined to think that those words were limitative and not merely illustrative With respect, we do not share that view The learned Judge himself referred to the following passage in Stroud's Judicial Dictionary,

"'That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause It has the following properties (1) it must not be contrary to the principal clause, (2) it must neither increase nor diminish it, (3) but where the principal clause is general in terms it may restrict it"

Taking the last item the learned Judge considered that it would not be possible to read, Item 21 in List II of Schedule VII to the Government of India Act which corresponds to Entry 18 in List II of the Constitution as comprising or comprehending anything beyond what has been described in particular items following the word "that is to say" We should not forget that we are concerned with the construction of a head of legislative power and in such a case unless we are compelled by the language, we ought to put upon the head the widest possible construction On a comparative reading of the relative Entries in the three Lists, we do not see why the expression "land" in Entry 18, List II should not be given its full amplitude and we do not think that the words "that is to say" justify a different construction. In our opinion, those words are merely illustrative and not restrictive or limitative. In any case, "rights in or over land" are comprehensive enough to include a legislation which fixes a ceiling on agricultural holding and provides for acquisition of the surplus and distribution of the same to the landless

In *Atma Ram* v. *State of Punjab*[2], the Supreme Court held that the Punjab Security of Land Tenure Act, 1953 was competent under Entry 18 in List II of Schedule VII to the Constitution Among other provisions, this Act provided for ceiling of land holding, a permissible area in relation to landlord and tenant being and restricted to thirty standard acres, and thereby released a large are a for resettlement of tenants ejected or to be ejected under the provisions of the Act. The Court upheld the validity of the Act under Entry 18 with these observations at page 522

"It will be noticed that the Entry (Entry 18) read along with Article 246 (3) of the Constitution has vested exclusive power in the State to make laws with respect to 'rights in or over land, land tenures including the relation of landlord and tenant ' the provisions of the Act set out above, deal with the landlord's rights in land in relation to his tenant, so as to modify the landlord's rights in land and correspondingly, to expand the tenant's rights therein Each of the expressions 'right in or over land' and 'land tenures' is comprehensive enough to take in measures of reforms of land tenure, limiting the extent of land in cultivating possession of the land-owner, and thus, releasing larger areas of land to be made available for cultivating by tenants"

Similarly, in *Sri Ram Ram Narain* v *State of Bombay*[3], the Supreme Court dealt with the validity of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 This Act also fixed a ceiling of agricultural holding, and provided for acquisition of land in excess of it and distribution of the same with a view to give effect to the directive principle contained in Articles 38 and 39 of the Constitution and the policy of establishing a socialistic pattern of society within the meaning of those Articles On a construction of Entry 18 with reference to the principles of construction, the Supreme Court said

"Having regard to the principle of construction enunciated above it is clear that the impugned Act is covered by Entry 18 in List II of the Seventh Schedule to the Constitution and is a legislation with reference to 'land' and this plea of legislative incompetence of the State Legislature to enact the Impugned Act therefore fails"

In *K Kunhikoman* v *State of Kerala*[4], in which one of the questions was as to the legislative competency to enact the Kerala Agrarian Relations Act, 1961 the Supreme Court was of opinion

1 A I R 1949 Bom. 219, 244
2 (1959) S C J 407 (1959) 1 S C R (Supp) 748 A I R 1959 S C 519
3 (1959) 1 S C R 489 (1959) S C J 679 (1959) 1 M.L J. (S C) 1. (1959) 1 An.W R. (S C) 1 A I R 1959 S C 459, 463
4 (1962) 1 S C J 510 (1962) 1 M L J (S C) 213 (1962) 1 An W R (S C) 213 A I R 1962 S C. 723, 727

"But if one looks at the purpose and object of the Act it will be clear that the main provisions of the Act are clearly within the legislative competence of the State Legislature under Item 18 of List II and Item 42 of List III "

The main purpose of the Kerala Act was to do away with intermediaries, fix a ceiling and give the excess land to the landless and those who hold lands much below the ceiling The method employed to carry out the object was first to acquire land and thereafter assign it to the cultivating tenant and landless and those with small extents of land The Assam High Court in *Anil Kumar* v *Deputy Commissioner and Collector*[1], held that the Assam Fixation of Ceiling on Land Holdings Act, 1957 was competent for the State Legislature to enact under Entry 18 of List II and Entry 42 of List III

Sri Vedantachari tried to distinguish those decisions and contended that in every one of those cases, while the landlord's right was curtailed, there was corresponding expansion of the tenants' right We do not think that the Madras Act which is impugned is substantially different from the Act dealt with in those decisions from the standpoint of the main purpose and the scheme and method of achieving that purpose, namely, destroying concentration of agricultural holding, acquisition and distribution of the excess over the ceiling area. In any case, we are unable to accept the view that the legislation to be valid under Entry 18 should do no more than effect an adjustment of rights and liabilities as between landlord and tenant, curtailing the rights of the landlord and correspondingly increasing the rights of the tenant.

Sri Vedantachari also argues that the acquisition of the surplus land will not fall under Entry 42 of List III particularly in view of the artificial definition of 'family' which applies both for the purpose of computation of the extent of the agricultural holding for fixation of ceiling area and also for determination of compensation for the excess land acquired and payment thereof The provisions relating to acquisition clearly lay down that the excess land acquired will vest in the State on acquisition and we can find no justification for the contention that the Act provides for transfer of land or title from one person to another for purposes of determination and payment of compensation The Act does make provision for enunciating the principles for determination and payment of compensation and this Court cannot go into the question of adequacy or quantum of compensation. Further, by reason of Article 31-B, the Act is not open to attack on ground of violation of Article 31 We hold, therefore, that the impugned Act is within the legislative competency of the State Legislature under Entry 18 of List II and Entry 42 of List III in the Seventh Schedule to the Constitution.

Sri Vedantachri contends that the impugned Act in so far as it relates to acquisition and payment of colopensation is a colourable exercise of power under Entry 42 of List III He says that by an artificial definition of a 'family' and by a fiction, we cannot regard properties under different titles as properties of one person or family, arrive at a surplus and then say that the surplus is acquired This argument differs only in form from the attack on the Act on the ground that it lacks legislative competency and offends fundamental rights We have already repelled that attack and upheld the validity of the Act. In our view, the effect, of the provisions of the Act in relation to the definition of a 'family' and the ascertainment of surplus over the ceiling area is merely for the purpose of applying ceiling and ascertaining the surplus The provisions of the Act nowhere, as already mentioned, provide for power to compel transfer from one person to another. Nor are titles mixed up for the purpose of payment of compensation. The argument is really not open in view of the Seventeenth Amendment to the Constitution relating to the power of acquisition and of the terms of Article 31-B.

There remains the question of construction of the impugned Act We think that this question will have to be decided more conveniently while disposing of each petition in the light of its facts. The petitioner in W P No 1543 of 1964 has stated

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1 A I R 1959 Assam 147

in his affidavit that the Authorised Officer has no power to decide the validity of the transfers As already noticed by us, section 11 provides for it and the Authorised Officer has power to decide questions of title in certain cases If the petitioner is aggrieved, the Act provides remedy against the orders of the Authorised Officer. The facts in W P. Nos 416 and 1473 of 1965 are of the same pattern and do not require detailed notice. They raise more or less the same questions as W P No. 1543 of 1964.

The petitions are all dismissed with costs, Counsels' fee Rs. 100 in each.

The Writ Petitions Nos. 416 of 1965 and 1473 of 1965 coming on this day before this Court for being mentioned, the Court made the following Order.

The Judgment of the Court was delivered by

Veeraswami, J.—Though we dismissed W P. Nos. 1473 of 1965, 1543 of 1964 and 416 of 1965, since then we have made certain observations in W P Nos 1474 of 1965 and 242 of 1965 in relation to sections 22 and 9 (2) (*b*) of the Act and in the circumstances the respondents may, we expect, take those observations into account in dealing with the relative matters further.

V K. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

The State Wakf Board, Madras represented by its Secretary . *Appellant**

v.

Abdul Azeez Sahib and others .. *Respondents.*

Wakfs Act (XXIX of 1954), *sections* 57 (1) *and* (3)—"*Suit relating to title to Wakf property*"—*Scope and content of—Counsel appearing in a suit relating to wakf property happening also to be Chairman of State Wakf Board—Knowledge of the Counsel of the suit if knowledge of the Wakf Board—If fixes latter with notice for the purpose of section* 57 (3).

The plaintiff filed two suits for recovery of certain properties which were resisted by the defendant on the ground that the properties belonged to a Wakf of which he was the representative These suits were decreed in favour of the plaintiff Thereafter a suit (O S No 432 of 1956) was instituted on behalf of the Wakf for a declaration that the decrees in the previous suits were fraudulent and collusive This suit was dismissed and the dismissal was confirmed in second appeal by the High Court on 2nd April, 1964 In the second appeal before the High Court the Counsel who appeared on behalf of the Wakf happened also to be the Chairman of the State Wakf Board On 6th June, 1964 the Secretary of the State Wakf Board received a letter from one *G* pointing out that the Wakf Board ought to have been made a party to O S No 432 and that the interests of the endowment have suffered because the statute was not complied with in this regard On this letter, on 6th July, 1964, namely, within the period of one month specified in section 57 (3) of the Muslim Wakfs Act, the State Wakf Board filed an application for declaring the decree in O S No 432 as void within the scope of section 57 (3) On the question whether the suit (O S No 432) was a "suit relating to title to wakf property" and if so whether the application filed by the Wakf Board was within time

Held, the suit (O S No 432) was a suit "relating to title to wakf property" within the meaning of section 57 (1) of the Muslim Wakfs Act, that the application filed under section 57 (3) was within time and that therefore the decree in Suit No 432 must be declared as void under section 57 (3)

The argument that the knowledge of the Counsel for the wakf in the second appeal disposed on 2nd April, 1964, was knowledge of the Chairman of the State Wakf Board, that the Board cannot claim that it had knowledge of Suit No 432 only on 6th June, 1964, when it received the letter from *G* and that therefore the application under section 57 (3) filed beyond one month from 2nd April, 1964, must be held to be time barred, is untenable

It cannot be maintained as a principle of law that any kind of knowledge or information, furnished to some officer of a corporate entity in any context whatever, can be fixed with the character of the knowledge or notice of the concerned corporate entity.

Even if the Chairman of the State Wakf Board obtains knowledge of a pending proceeding, in some informal manner, or in a context that has no relation to the functions of the State Wakf Board, it cannot be seen how it could be presumed that such knowledge is the official knowledge of the Chairman and by a further process of reasoning that it is the knowledge of the Wakf Board itself

* L.P A. No 111 of 1965. 30th March, 1966.

Appeal under Clause 15 of the Letters patent against the order of the Honourable Justice Kailasam dated 7th October, 1964, and made in C.M P. No 6252 of 1964 presented to the High Court to declare the decree dated 22nd April, 1958, in O.S No 432 of 1956 on the file of the Court of the First Additional District Munsif of Tiruchirappalli as confirmed by the decree of the District Court (Additional Judge) Tiruchirappalli dated 7th September, 1960, in A S No. 437 of 1958 and the Judgment and Decree of the High Court dated 2nd April, 1965 in S A. No. 965 of 1961 as void.

M M. Ismail and *M. A. Sathar Sayeed*, for Appellant.

N. Arunachalam and *S M. Amzad Nainar*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O C J—This Letters Patent Appeal has been instituted by the Wakf Board of Madras State, represented by its Secretary, from the Judgment of Kailasam, J. in C M P No 6252 of 1964 in S A No 965 of 1961. We may very briefly state, before setting out the essential facts necessary for an analysis of the ground of controversy in this appeal, that the application was under the Muslim Wakf Act, for declaring a particular decree (decree in O.S. No 432 of 1956 on the file of the Third Additional District Munsif, Tiruchirappalli confirmed by the Judgment in A S No. 437 of 1958, District Court, Tiruchirappalli and S A. No. 965 of 1961 of this Court) as void within the scope of section 57, sub-clause (3) of the Act (XXIX of 1954). The Learned Judge (Kailasam, J) dismissed the petition as barred by limitation and the appeal is from this order.

Before proceeding to the facts, it may be necessary to notice the precise terms of sections 57 (1) and 57 (3) of the Wakf Act (XXIX of 1954). Section 57 (1) states :

" In every suit or proceeding relating to title to wakf property . . . the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding "

Under section 57 (3):

"In the absence of a notice under sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf "

The following events and dates, furnishing the background of the litigation, are essential for a proper understanding of the ground of controversy The dispute related to a Wakf known as Rustom Shaheed Durga Wakf in Sirudayur Village, Tiruchirappalli District. Admittedly, the Wakf was included in the list of the Wakfs published by the Wakf Board in the *Fort Saint George Gazette*, dated 10th February, 1958. A certain Kandaswami Iyer filed O S No. 616 of 1949 and O S. No 12 of 1950 in the District Munsif's Court, Tiruchirappalli for recovery of possession of two properties, S Nos 131/3 and 132, of Sirudayur Village, and these actions were resisted by the Durga on the ground that these were properties of the Durga in which the plaintiff had no rights whatever It is admitted that the suits were dismissed by the trial Court (the learned District Munsif) on 15th October, 1951. First appeals were filed by the plaintiff concerned, in the Court of the Subordinate Judge, Tiruchirappalli, and they were numbered as A S No 49 and 50 of 1952 and dealt with on the merits. It is not in dispute that the appeals were allowed on 2nd September, 1952, thereby declaring the title of the plaintiff and his right to possession. S A. Nos 2053 and 2054 of 1952 were again decided in favour of that plaintiff and were dismissed by Krishnaswami Nayudu, J , on 25th January, 1956 In this context itself, we may note that the Muslim Wakfs Act (XXIX of 1954) received the assent of the President on 21st May, 1954 There was a period of an interregnum, when no Wakf Board under the Act was constituted in Madras State ; but ultimately such a Board was constituted on 1st February, 1958

There was a subsequent suit, O S No 432 of 1956, instituted on behalf of the Durga, for a declaration that the decrees in the two previous suits, in the First Appel-

late Court and in Second Appeals in this Court, which allowed and established the claim of the plaintiff (Kandasami Iyer) to the suit properties, and his right to possession, were really fraudulent and collusive decrees, obtained by collusion between the plaintiff and the then representative of the Durga This was dismissed by the District Munsif of Tiruchirappalli on 22nd April, 1958, and the first appeal from this decree of dismissal (A S No 437 of 1958) was dismissed by the District, Judge on 7th September, 1960 On 2nd April, 1964, the Second Appeal from this decree (S A No 965 of 1961) was disposed of by Kailasam, J., and the Second Appeal was dismissed The application out of which the Letters Patent Appeal arises, seems to have been instituted in July, 1964.

On 6th June, 1964, the Secretary of the State Wakf Board, received a letter from one L N Ghulam Mohamed, whose precise status and interest need not concern us now, pointing out the above fact, and equally stressing that the Wakf Board ought to have been made a party at least to the subsequent litigation which came into existence after the Board was constituted, and that the interests of the endowment have suffered because the statute was not complied with in this regard On this letter, on 6th July, 1964, namely within the period of one month specified as the period of limitation in section 57 (3) that we have extracted, and set forth earlier, the Wakf Board instituted C M P No 6252 of 1964 under section 57 (3) of Act XXIX of 1964 The legal representative of the original plaintiff strenuously contended before the learned Judge (Kailasam, J), that, on two main grounds, this Civil Miscellaneous Petition should fail The first was that whatever might be said about the character of the two original suits, namely, O S. Nos 616 of 1949 and O S No 12 of 1950 the subsequent suit (O S No 432 of 1956) could not be regard as " a suit or proceeding relating to title to property " within the meaning of these words in section 57 (1) On the contrary, the suit or proceeding related to the nature of the decrees in the two earlier suits, as fraudulent and collusive, and sought to establish that character The title to the properties was not directly in issue in the subsequent suit (O S. No. 432 of 1956) and the suit on the relevant proceedings did not thereby violate section 57 (1) because no notice was issued to the Wakf Board.

The second ground was that, in any event, the application was barred by limitation. Shri P Sherfuddin, Learned Counsel who appeared on behalf of the representatives of the Durga who filed O S No. 432 of 1956, in this Court in Second Appeal (S A. No 965 of 1961), must necessarily have been aware of the nature of the proceedings and of the properties concerned He was thus aware that the proceedings related to certain decrees, which declared the title to properties against the Durga (and thereby against the Wakf Board) Thus, the Board must be considered to have had knowledge of the suit or proceedings when Sri Sherfuddin appeared in S A No 965 of 1961, since admittedly Sri Sherfuddin was elected Chairman of the Madras State Wakf Board, on 11th May, 1963, and has functioned as such officer ever since Of the two arguments, Kailasam, J , dismissed the argument based upon the non-applicability of the terms of section 57 (1) to the subsequent suit But he did accept the argument that the State Wakf Board must be held to have had knowledge of the proceedings even in April, 1964, when the second appeal was disposed of by the learned Judge, and when Shri Sherfuddin appeared as Counsel for one of the parties, since the knowledge of Shri Sherfuddin was the knowledge of the Chairman of the State Wakf Board, the Board had the necessary knowledge long before its application in this petition the Board cannot claim that it had knowledge only on receipt of the letter from Shri Ghulam Mohammad dated 6th June, 1964. This argument was accepted by the learned Judge, with the result that the proceeding was dismissed on the ground of limitation.

Sri Arunachalam for the present respondents (legal representatives of the original plaintiff) sought to support the judgment of the learned Judge, even on the ground on which the learned Judge held against his clients, that is, the ground relating to the application of section 57 (1) of the Act to the subsequent suit We shall immediately dispose of this matter, before proceeding to the ground on which the learned Judge dismissed the application of the Wakf Board before him.

We have no doubt whatever that the learned Judge, (Kailasam, J), was correct in his view that even the second suit has to be interpreted as within the scope of the words employed in section 57 (1) namely, " In every suit or proceeding relating to title to Wakf property ". There is ample judicial authority for the view that such words as ' relating to " or " in relation to " are words of comprehensiveness which might both have a direct significance as well as an indirect significance, depending on the context They are not words of restrictive content and ought not to be so construed The matter has come up for judicial determination in more than one instance The case in *Compagnie Financiee Due Pacifique* v *Peruvian Guano Co* [1], is of great interest, on this particular aspect and the judgment of Brett, L J , expounds the interpretation of Order 31, rule 12 of the Rules of the Supreme Court, 1875, in the context of the phrase " material to any matter in question in the action " Brett, L J , observed that this could both be direct as well as indirect in consequences and according to the learned Judge the test was this (at page 63)

" . a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversory if it is a document which may fairly lead him to a train of inquiry, which may have either of these consequences "

In other words applying the test of that decision to the present situation of fact, if allowance of the claim in O S No 432 of 1956, the second suit, would necessarily have consequences, upon the declaration of title to the property claimed as Wakf property in the earlier suit, it is also a suit or proceeding " relating to Wakf property" The fact that two steps have to be taken to arrive at this inference, instead of one direct step, cannot make any essential difference

In *Nital Charan* v *Suresh Chandra* [2], a Bench of that Court had occasion to consider a very similar rule relating to section 5 (4) and item 7 of the First Schedule of the West Bengal Civil Court's Act XXIof 1953, and it is noteworthy that the very phrase interpreted was the phrase " relating to ". The learned Judges cited the dicta of Sulaiman, C J , in *Shyamalal* v *Shyamlal* [3], to the effect that matters may not, strictly speaking be the subject-matter of the suit itself as brought, and yet they may relate to the suit The learned Judges also cited and followed the dicta of Brett, L J , in the case that we have referred to Our attention has not been drawn to any decision, embodying or expressing a contrary view, of a more restricted interpretation of such words as " relation to " The authorities and the lexicons to which our attention has been drawn, are uniformly in favour of the more comprehensive interpretation We think it is sufficient, in this context, to refer to 76 Corpus Juris Secudum 621 on the word " relate ", commentary on the word :

" It is a very broad word, and it presupposes another subject-matter. "

In the light of these authorities we agree with the learned judge in his view that the second suit and decree do come within the ambit of section 57 (1) of Act XXIX of 1954 That being the case, if the application is in time, the State Wakf Board (Appellant) has every right to advance such an application, and the Court will have jurisdiction, to hear and determine the application The question whether the application on the present facts, is time barred or not, is of course, another matter But we might make it clear in the present context itself, that the fact that the second suit, ripened into a decree which was confirmed in first and second appeals appears to us to make no essential difference.

The consequences of our declaring the decree as void, in terms of section 57 (1) may be extremely inconvenient; it may even involve further complications, and disturb a state of rights that has not been challenged since the year 1952 But this consequence of the situation of law cannot be shirked So long as the law is clear, it is our duty to give effect to the intent and purport of the section of the law as it stands, irrespective of the impact or consequence of this finding on the rights of parties

1 (1882-3) 11 Q B D 55.
2 66 C W N 767
3 A I R 1933 All 649 (F B)

After very careful consideration, we are convinced that the view of the learned Judge cannot be supported, that the knowledge of Shri Sherfuddin Counsel for the representatives, of the Durga in S A. No 965 of 1961 disposed of on 2nd April, 1964, is knowledge of the Chairman of the State Wakf Board, and as a further step, that such knowledge on his part will fix the Wakf Board itself with the knowledge of these relevant proceedings For a variety of reasons which appear to us to merit acceptance at our hands, we are unable to agree with the learned Judge in thinking that this issue can at all be approached from the prospective of 'piercing the veil' of corporate personality. The learned Judge has quoted two extracts in support of his view. One of them is from Dillon on Municipal Corporations, Vol. II page 1296, and another from Clerk on Modern Corporation Law, Vol I at page 25 At the highest, these passages may justify the interpretation that, where a corporation has certain duties or obligations, the fact that its servants had the requisite knowledge, might lead to the just inference that the corporation had the knowledge and should undertake the obligation It is generally where the corporate personality is put forward as a means or pretext to perpetuate fraud, or to evade a plain responsibility, that Courts have pierced the veil of that personality juristic entity Observations to this effect are to be found in the judgment of of Mekenna, J, in *J J Mc Caskill Co* v. *United States*[1], and they have been cited by the learned Judge

But the present is a widely different matter Shri Sherfuddin, learned Counsel for the representatives of the Durga, might or might not have realised that the context of situation was such that the Wakf Board ought to have notice under section 57 (1) of Act XXIX of 1954 Even if he had this consciousness or knowledge he might have well hesitated to take action as Chairman of the State Wakf Board. His knowledge might have been imported to him by his clients (representatives of the Durga) and he might have felt naturally hesitant in taking advantage of information thus conveyed to learned Counsel in order to fulfil some statutory duty relating to a totally distinct capacity As a principle of law, we do not think that it can be maintained that any kind of knowledge or information, furnished to some officer of a corporate entity in any context whatever, can be fixed with the character of the knowledge or notice of the concerned corporate entity. On the contrary, there are authorities, definitely against such a view

We think it is sufficient, in this context, to cite the very clear dicta appearing in Halsbury's Laws of England (Simonds edition) Vol 6, p 435 under sub-section 'notice to officers' The learned author states

> "In order that notice to a company may be effectual it should either be given to the company through its proper officers or received by the company in the course of its business Notice to a director or other officer of the company in that character is sufficient, but not a notice received by a director in the course of a transaction in which he is not concerned as such director or officer or if it relates to a matter which he is not bound to and does not disclose "

The analogy drawn from texts, in which Courts have pierced the veil of corporate personality, in order to prevent fraud, or to prevent the corporation from evading its plain statutory obligations to citizen, is quite misleading, and cannot, in our view, be pressed into the present context at all.

Apart from the authority that we have cited, we are further strengthened in this by the observations of Mukharji, J., in *Commissioner of Wakf* v *Ayesa Bibi*[2] The facts of that case were no doubt quite different and the main point involved was also a different one. In that case there was a compromise decree between the parties after the Commissioner of Wakfs, who was party before the Court, had been struck off the record by these parties, and the compromise was arrived at after the exclusion of the Commissioner from the array of parties But one observation of

1. (1910) 216 U S 504. 2. A I.R 1966 Cal. 68.

the learned Judge appears to us to be significant in the present context That is the observation at page 72, para. 18, to this effect.

"Suppose in a case the Commissioner had independently and privately come to know of a suit in respect of a Wakf property within the meaning of section 70 (1) of the Act, can it be said that his independent private knowledge will exonerate the Court from its obligation to give notice to the Commissioner? I do not think so"

In our view, therefore, the knowledge of Sri Sherfuddin learned Counsel for the representatives of the Durga in the second appeal, was not the knowledge of the Chairman of the State Wakf Board and cannot be held to constitute such knowledge That is the case, even if Shri Sherfuddin was the Chairman of the State Wakf Board at the relevant period. Further, there is the complication that there may have been a conflict of duty, if Shri Sherfuddin had acted on the knowledge obtained by him as Counsel in his capacity, as Chairman of the State Wakf Board Even if the Chairman of the State Wakf Board, obtains knowledge of a pending proceeding, in some informal manner, or in a context that has no relation to the functions of the State Wakf Board, we are unable to see how it could be presumed that such knowledge is the official knowledge of the Chairman, and by a further procees of reasoning that it is the knowledge of the Wakf Board itself. Accordingly, we hold that the application was within time, and it follows on our finding that the appeal, will have to be allowed, and that the application must also stand allowed.

The consequence of this will be that the decree in the second suit has to be declared void, within the meaning of the express language of section 57 (3) of Act XXIX of 1954 Some arguments have been submitted before us on the further and inevitable consequences of such a declaration or finding We are expressing no opinion whatever on that aspect, and it does not appear to us to be relevant to the present appeal. Whether it immediately follows that the suit itself is reopened with the consequence that there must be notice of the Court to the State Wakf Board, which must be brought on record and heard in the suit, or whether the consequences in strict law are different, will be matters for the concerned Court to decide, when it is approached in this regard The appeal is allowed No order as to costs throughout

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Chief Justice.*

The South India Insurance Co, Ltd, (Head Office) Bombay .. *Petitioner**

v.

Lakshmi and another .. *Respondents*

Madras Motor Accidents Claims Tribunal Rules (1961), rules 7 and 18—Proceedings before Claims Tribunal—Applicability of Civil Procedure Code—Inherent power to permit such procedures as are rendered imperative by principles of natural justice—If can permit filing of an additional written statement—Questions of law not raised in the pleading—If can be urged

Though under the Madras Motor Accidents Claims Tribunal Rules certain provisions of the Code of Civil Procedure alone are made applicable to proceedings before the Claims Tribunal, nevertheless the Tribunal is not divested of an inherent power to permit such other procedures as are rendered imperative by the principles of natural justice The principle of section 151, Civil Procedure Code has an intrinsic application to all judicial and or quasi-judicial tribunals, though the section itself may not apply

Thus though the Madras Motor Accidents Claims Tribunal Rules provide only for the filing of a written statement and not for an additional written statement, the Claims Tribunal will have inherent powers to permit the filing of even an additional written statement

Further a pure question of law, related to a pleading already on record, could be taken in defence even without an additional written statement in that behalf

Petitions under Article 227 of the Constitution of India, praying the High Court to revise the orders of the Court of the Motor Accidents Claims Tribunal (District

*C.R P. No. 1708 of 1965. 18th August, 1966.

Judge) Tiruchirappalli, dated 18th July, 1965, and made in I.A Nos. 185 and 184 and 183 of 1965 in M.A.C T O.P Nos. 33 of 1964 and 15 of 1965 respectively.

M. P. Subramanian, for Petitioner.

S. Jayaraman for *P. Raghaviah*, for Respondent.

The Court made the following

ORDER —It is true that with regard to the Madras Motor Accidents Claims Tribunal Rules (1961) certain provisions of the Code of Civil Procedure alone have been made applicable to proceedings before the Claim Tribunal, as provided for in Rule 18 Presumably, other provisions of the Code of Civil Procedure may not apply by implication It is further true that under Rule 7 of Rules, there is provision only for the filing of a written statement, and there is no reference to the filing of an additional written statement subsequently, for which there is express provision under Order 8, rule 9, Civil Procedure Code Nevertheless, I do not think that the Court or Tribunal is divested of an inherent power to permit such procedures as are rendered imperative by the principles of natural justice, even though there may be no explicit reference to such a procedure in the Rules. The principle of section 151, Civil Procedure Code, has an intrinsic application to all judicial or quasi-judicial tribunals, though the section itself may not apply. That is for the reason that the principles of natural justice themselves have never been codified in the system of jurisprudence that prevails in this Country, while all Courts and quasi-judicial tribunals have been uniformly held bound to respect these principles

An authority helpful upon this point of view is *Messrs Grez Beckert Sabool Ltd.* v. *Jupitor General Insurance Co , Ltd* [1], which was also a proceeding for a claim for compensation for an accident under the Motor Vehicles Act The learned Judge held that, in the absence of a positive authority like the Code of Civil Procedure, the Tribunal should have reasoned by analogy, as nearly as possible to such provisions

In the present matter it is really not necessary to go so far While there is no provision or rule, as such for the insurance company (respondent) to file an additional written statement, the insurance company is always at liberty to put forward a ground of law in defence That is permitted, because there can be no bar or prohibition to a legal defence, precisely as it cannot be argued that a clerical error in the pleadings cannot be corrected by a party even in the absence of an explicit provision ; obviously, to deny such relief would be opposed to the principles of natural justice In the present case, in two of the claims, the proprietor of the concerned vehicles has taken the plea that, prior to the date of the accident, the vehicle was transferred to another person, so that there was no subsisting legal liability on his part It is not disputed before me that in accordance with the proposition of law enunciated by the Division Bench in *M Boopathy* v *M S Vijayalakshmi* [2], the transfer of the ownership of the vehicle will have the legal consequence of terminating the contract of insurance, so that the company is no longer liable under that policy. In the present case, therefore, it is always open to the company to urge that if such transfer be true, the company has no legal liability in respect of the claims for damages arising out of the accident Strictly speaking, no additional written statement to this effect is necessary, since it is a pure question of law related to a pleading, which is already on the record

The Revision Petitions are accordingly dismissed, in the light of these observations The parties will bear their own costs.

V.K *Petitions dismissed.*

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1 A I R 1965 Punj 477. 2 (1965) 2 M L J 466

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Gangadhar Narasingdas Agarwal and others .. *Petitioners**

v.

The Union of India, represented by the Secretary to Government of India, Ministry of Finance, New Delhi, and others . *Respondents.*

Foreign Exchange Regulation Act (VII of 1947), sections 12 (1) and 12 (2)—Declaration under section 12 (1)—Requirements—Section 12 (2) when attracted.

Interpretation of Statutes—Resort to rules framed under a statute to interpret a section of the statute—Permissibility.

Foreign Exchange Regulation Act (VII of 1947), section 12 (1)—Notification, dated 4th August, 1947, issued by the Central Government under—Validity.

Words and Phrases—" Any ".

Foreign Exchange Regulation Rules (1952), rule 3—Validity.

General Clauses Act (X of 1897), section 6 (e)—Scope and effect.

The argument that section 12 (1) of the Foreign Exchange Regulation Act (1947) does not make it incumbent on the exporter to furnish the true export value of the goods and that all that he is called upon to do is to undertake that the amount as noted in the invoice would be paid in the prescribed manner, is untenable. What is required of the exporter is a declaration that the amount given in the invoice is the full export value of the goods and that the value of the goods has been or will be paid in the prescribed manner.

To hold otherwise would result in defeating the very object of the section. If the correct value is not given and the undertaking is restricted to realisation of the undervalued amount, the full price of the exported goods will not be available to the country.

Section 12 (1) does not admit of any ambiguity in this regard. But even if it is taken that the words of the section are not very clear, the Court may refer to the rules made under the Act, namely, the Foreign Exchange Regulation Rules (1952) which are directed by the statute to be read as part of the Act, for as stated by Craies on Statute Law (6th Edition, page 157) where the language of an Act is ambiguous the Court may refer to the rules made under the Act especially where such rules are directed to be read as part of the Act.

Thus a reference to rules 3 and 5 of the Foreign Exchange Regulation Rules (1952) read with the undertaking required to be given in Form G.R. 1, makes it clear that the declaration to be given under section 12 (1) of the Foreign Exchange Regulation Act is not only that the value of the goods will be paid in the prescribed manner but also that the full export value of the goods given in the declaration is the correct value.

Hamad Sultan v. *Abrol*, Mis. Appln. No. 376 of 1957 (Bombay High Court), dissented from.

When the full export value given is correct subject to variation of the particulars due to change in quantity or quality or fluctuation in the market rate, the full export value given cannot be said to be not true. But when the actual export value is deliberately not given or a low value is given for the purpose of secreting the balance of foreign exchange, it cannot be said that the declaration regarding the full export value of the goods is given as required in section 12 (1). The mere fact that the authorities at that time did not know the correct export value of the goods or were induced to accept the figure given by the exporter and allowed the goods to be exported would not have the effect of removing the goods from the category of prohibited goods. In such a case a contravention of section 12 (1) of the Foreign Exchange Regulation Act would be made out and the offence would be punishable under section 167 (8) of the Sea Customs Act, 1878.

Section 12 (2) of the Foreign Exchange Regulation Act is applicable only to goods where the sale has not been completed. That means that the section is applicable to consignors of goods, that is persons entitled to sell or procure the sale of the goods, that is to a stage before the actual sale.

The contention that the notification of the Central Government, dated 4th August, 1947, issued under section 12 (1) of the Foreign Exchange Regulation Act prohibiting the export of " all " goods is contrary to the powers vested in the Government on the ground that what section 12 (1) empowered was to prohibit the export of " any " goods or class of goods and not "all " goods as done by the notification, is without force. The word " any " is a word which excludes limitation or qualifications.

Rule 3 of the Foreign Exchange Regulation Rules (1952) is not *ultra vires* the power conferred on the Government.

Where there is a repeal of an enactment the consequences laid down in section 6 of the General Clauses Act will follow, unless a different intention appears. It cannot therefore be contended that

*W.P. Nos. 3948 of 1965, 1592, 1593, 1594 and 1601 of 1966. 1st September, 1966.

after the amendment of the Foreign Exchange Regulation Act (1947) by Act (LV of 1964) and after the repeal of the Sea Customs Act (1878) no further proceeding can be taken for contravention of section 12 (1) of the Foreign Exchange Regulation Act before the amendments were introduced

Petitions respectively under Articles 226 and 226 (1-A) of the Constitution of India praying that in the circumstances stated therein in each petition and in the affidavits filed therewith, the High Court will be pleased to issue writs of Prohibition in each petition prohibiting the respondents in all the petitions from taking any action in pursuance of the show cause notice dated 17th February, 1965, bearing Ref Nos S 21/25/65, S. 21/20/65, dated 17th February, 1965, S. 21/ 18/65 dated 17th February, 1965 and S. 21/104/65 dated 17th July, 1965 mentioned in Exhibit A to the said affidavit issued by the Deputy Collector of Customs, Visakhapatnam, the third respondent in all the petitions herein.

R J Joshi for *K. C. Jacob*, *S K L Ratan* and *R Vedantam*, for Petitioners.

The Advocate-General for *G Ramanujam*, for Respondents

The Court made the following

ORDER —These Writ Petitions raise the same question and can be dealt with together As the facts in all the petitions are similar, I will deal with Writ Petition No 3948 of 1965 This petition is filed for the issue of a Writ of Prohibition for prohibiting the respondents from taking any action in pursuance of the show cause notice dated 17th February, 1965 bearing Ref No S 21/25/65 issued by the Deputy Collector of Customs, Visakhapatnam

The respondents received information that Seth Durgaprasad and his close relatives having their main business and residential premises at Tumsar and Nagpur had considerable quantity of hoarded gold, which had not been declared by them under the Gold Control Rules Searches were conducted on 19th and 20th August, 1963 in the premises of the petitioners and several documents were seized According to the respondents, the documents indicated that the petitioners committed offences punishable under Sea Customs Act, 1878, read with Foreign Exchange Regulation Act, 1947 It is stated that the documents showed that the petitioners had resorted to under-invoicing of Mineral Ores, particularly Manganese Ores to the extent of a few crores of rupees In February, 1965, 53 show cause notices were issued to the petitioners, and 50 more subsequently These related to the shipment of Manganese Ores from Visakhapatnam According to the respondents, the extent of undervaluation is about Rs 2,96,63,353 The show cause notices were issued by the Deputy Collector of Customs, Visakhapatnam, calling upon the petitioners to show cause in writing to the Collector of Customs as to why penalties should not be imposed upon them under section 167 (8) of the Sea Customs Act, 1878, for being persons concerned in the export of Manganese Ores from Visakhapatnam in contravention of the restrictions and prohibitions, imposed under section 19 of the Sea Customs Act, 1878, read with section 12 (1) and the Notification No. 12 (17) F 1/47 dated the 4th August, 1947 (as amended) issued thereunder, and section 23-A of the Foreign Exchange Regulation Act, 1947 The Writ Petitions are filed praying for the issue of Writ of Prohibition prohibiting the respondents from further proceeding with the matter

It is alleged in the show cause notice that the goods were exported without making in respect thereof a proper declaration to the effect that their full export value had been paid in the prescribed manner as required under section 12 (1) of the Foreign Exchange Regulation Act, 1947, read with the relevant notification No 12 (17) F 1/47, dated the 4th August, 1947 (as amended) issued thereunder and the Foreign Exchange Regulation Rules, 1952 It was further alleged that the goods had been exported in contravention of the restrictions and prohibitions imposed under section 19 of the Sea Customs Act, 1878, read with section 12 (1) and the notification No 12 (17) F 1/47, dated the 4th August, 1947 (as amended) issued thereunder and section 23-A of the Foreign Exchange Regulation Act, 1947, which exportation constitutes an offence liable to be punished under section 167 (8) of the Sea Customs Act, 1878.

Before setting out the contentions of the parties it is necessary to refer to the relevant provisions of the Foreign Exchange Regulation Act, 1947 and the Rules and Forms made thereunder, and the Sea Customs Act, 1878 The Foreign Exchange Regulation Act (VII of 1947) came into force on 25th March, 1947. The reasons for passing the Act are given in the Preamble, as follows —

" Whereas it is expedient in the economic and financial interests of India to provide for the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion "

Section 12 (1), which the petitioner is alleged to have contravened, may be set out:

"*Payment for exported Goods* —(1) The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea, or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner."

Sub-section (1) of section 12 enables the Central Government to prohibit by a notification the export of any goods from India, unless a declaration is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner The Central Government issued a notification dated 4th August, 1947 prohibiting the export of goods to any place outside India, unless a declaration supported by such evidence as may be prescribed is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner. Apart from the powers conferred on the Central Government under section 12 (1) of the Act, section 27 of the Foreign Exchange Regulation Act, 1947, also empowered the Central Government by notification in the Gazette to make Rules for carrying into effect the provisions of the Act Sub-section (2) (*a*) of section 27 specifically conferred powers on the Government to make Rules prescribing forms and the circumstances of their use for the purposes of this Act The Foreign Exchange Regulation Rules, 1952 were framed by the Central Government in exercise of the powers conferred by section 27 of the Foreign Exchange Regulation Act, 1947 Rule 3 provides that a declaration under section 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Gazette of India specify as appropriate to the requirements of a case Several forms are set out in the First Schedule, and the form admittedly applicable to the present case is G R 1 Rule 5 empowers the Reserve Bank, the Collector of Customs or the postal authorities, to require the exporter to furnish such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India or has a place of business in India The authorities may also require the exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them (*i*) that the destination stated on the declaration is the final place of destination of the goods exported, (*ii*) that the invoice value stated in the declaration is the full export value of the goods, and (*iii*) that the amount representing the full export value of the goods has been or will be paid to the exporter Form G R 1 in the First Schedule requires the exporter to furnish information as required in the form The exporter is also required to make a declaration, which may be set out in full:

" I hereby declare that I am the seller/consignor of the goods in respect of which this declaration is made and that the particulars given above are true and (*a*) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer, (*b*) that this is a fair valuation of the goods which are unsold

I/My principals undertake that I/they will deliver to the bank mentioned below the foreign exchange/rupee proceeds resulting from the export of these goods on or before . "

Section 22 of the Foreign Exchange Regulation Act prohibits a person, when complying with any order or direction under section 19 or with any requirement under section 19-H or when making any application or declaration to any authority or person for any purpose under this Act, from giving any information or making any

statement which he knows or has reasonable cause to believe to be false, or not true, any in material particular If any person contravenes the provisions of section 4, 5 or 9 or section 12 (2) or any rule or direction or order made thereunder, he shall be liable to a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place or five thousand rupees, whichever is more under section 23 (1) (*a*) of the Act Section 23 (1) (*b*) provided that for the offences above stated a person upon conviction by a Court shall be punishable with imprisonment for a term which may extend to two years or with fine or with both Section 23 (1-A) (*a*) provided that a person who contravenes any of the provisions of section 23, and section 19 shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both Section 23-A provided as follows .—

> " Without prejudice to the provisions of section 23 or to any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8, sub-section (1) of section 12 and clause (*a*) of sub-section (1) of section 13 shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 (VIII of 1878), and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word " shall " therein the word may were substituted."

Section 19 of the Sea Customs Act, 1878, empowers the Central Goverment from time to time, by notification in the Official Gazette to prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government By virtue of section 23-A of the Foreign Exchange Regulation Act, 1947 the restriction imposed by sub-section (1) of section 12 is deemed to have been imposed under section 19 of the Sea Customs Act, and all the provisions of the Sea Customs Act will take effect Consequently a contravention of sub-section (1) of section 12 will be contravention of section 19 of the Sea Customs Act, punishable under section 167 (8) of the Sea Customs Act, 1878 Section 167 (8) of the Sea Customs Act provides as follows :—

> " If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction, or if any attempt be made so to import or export any such goods, or if any such goods be found in any package produced to any officer of Customs as containing no such goods, or if any such goods, or any dutiable goods be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India, or if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction such goods shall be liable to confiscation, and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees "

An examination of the provisions of the Foreign Exchange Regulation Act, 1947 and the Sea Customs Act, 1878, would reveal that contravention of section 12 (1) of the Foreign Exchange Regulation Act is punishable not only under section 23 (1) (*a*) of the Foreign Excharge Regulation Act but also under section 167 (8) of the Sea Customs Act While section 23 (1) (*b*) of the Foreign Exchange Regulation Act provides that contravention of section 12 (2) is punishable on conviction with imprisonment for a term which may extend to two years, or with fine, or with both, section 23-A of the Foreign Exchange Regulation Act, 1947 read with sections 19 and 167 (8) of the Sea Customs Act provides that without prejudice to the provisions of section 23 (1) (*a*) the goods are liable to confiscation and the person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods The contravention of section 12 (2) is punishable under section 23 of the Act and the offender is liable to a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, whereas in the case of an offence under section 12 (1) of the Foreign Exchange Regulation Act, to which section 167 (8) of the Sea Customs Act is attracted the punishment would extend to confiscation of the goods and penalty not exceeding three times the value of the goods The punishment under section 167 (8) of the Sea Customs Act is far more severe, in that the goods are liable to be confiscated and the penalty may extend to three times the value of the entire goods, whereas under section 23 (1) (*a*) the penalty can only be three times the value of the foreign exchange in respect

of which the contravention has taken place Besides the provisions above referred, section 22 of the Foreign Exchange Regulation Act prohibits a person when complying with any order or directing under section 19 or when making any application or declaration to any authority or person for any purpose under the Act from giving any information or making any statement which he knows or has reasonable cause to believe to be false, or not true, in any material particular If this section is contravened the offender is liable to be punished under section 23 (1) (*b*) that is with imprisonment for a term which may extend to two years But there is no provision for confiscation or penalty under section 23 (1) (*a*) of the Act

The main attempt of the learned Counsel for the petitioner was to avoid the clutches of section 12 (1) of the Act According to his submission, if the facts alleged by the prosecution are made out the offence may amount to one under section 12 (2) or section 22 punishable under section 23 (1) (*a*) of the Act but would not amount to one under section 12 (1) of the Act. In support of his contention that section 12 (1) is not applicable to the facts of this case, the learned Counsel for the petitioner submitted that what is required under the sub-section is that the exporter should declare to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner, that is an undertaking, that the full export value of the goods will be paid in the prescribed manner and when once that undertaking has been given the conditions required under section 12 (1) are complied with According to the learned Counsel, the sub-section does not make it incumbent on the exporter to furnish the true export value of the goods, and all that he is called upon to do is to undertake that the amount as noted in the invoice would be paid in the prescribed manner The purpose of the enactment is to safeguard the economic and financial interest of the country and for that purpose to provide for the regulation of foreign exchange. In order to achieve this purpose the Central Government is empowered to prohibit the export of any goods, unless certain conditions are fulfilled To safeguard the economic and financial interests of the country it is necessary that the goods exported by way of sale obtain the best price possible and that the price shall be remitted to the country within the prescribed period and in the prescribed manner For achieving this object sub-section (1) of section 12 provides that the Government may prohibit the export of any goods unless a declaration supported by such evidence as may be prescribed or so specified is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner. The authorities may require the exporter to produce evidence in support of the declaration in the prescribed manner for establishing that the amount representing the full export value of the goods has been paid in the prescribed manner The contention of the learned Counsel for the petitioner is that what is required of the exporter is an undertaking from him that the full export value of the goods has been paid and that the declaration does not embrace the statement that the full export value given is correct On a reading of sub-section (1) of section 12, I am satisfied that what is required of the exporter is a declaration that the amount given is the full export value of the goods and that the value of the goods has been paid in the prescribed manner. To hold otherwise would result in defeating the very object of the section If the correct value is not given and the undertaking is restricted to realisation of the undervalued amount, the full price of the exported goods will not be available to the country The evidence which has to be adduced in support of the declaration by the exporter is for satisfying the prescribed authority (1) that the amount represented the full export value of the goods, and (2) that the amount has been paid Sub-section (1) of section 12, in my view, does not admit of any ambiguity Even if it is taken that the words of the sub-section are not very clear, the Court may refer to the rules made under the provisions of the Act, where such rules are directed by the statute to be read as part of the Act Sub-section (1) of section 12, as already stated, provides that the exporter may be required to produce such evidence as may be prescribed The word "prescribed" is defined as meaning prescribed by rules made under this Act (Foreign Exchange Regulation Act,

1947)' The rules framed under the Act are the Foreign Exchange Regulation Rules, 1952. Rule 3 provides that the declaration shall be in the form set out in the First Schedule the relevant form being G R.I. Rule 5 provides that the Reserve Bank or the Collector of Customs or the postal authorities may require the exporter to produce in support of his declaration such evidence to satisfy them that the invoice value stated in the declaration is the full export value of the goods. The form G R I which is referred to in rule 3, requires that the seller or the consigner of the goods should declare that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer He has also to undertake that he will deliver to the bank the foreign exchange rupee proceeds resulting from the export of these goods on or before a particular date While rule 5 enables the authorities to satisfy themselves that the invoice value stated in the declaration is the full export value of the goods, the form requires that the exporter should declare that the invoice value is the full export value of the goods Even assuming for the purpose of argument that the wording of sub-section (1) of section 12 is not clear, sub-section (1) read with rules 3 and 5 and the undertaking in the form G R I make it clear that the declaration to be given by the exporter is not only that the value of the goods will be paid in the prescribed manner but also that the full export value of the goods given is the correct value Craies on Statute Law (6th Edition) at page 157 states as to how far assistance can be derived from the rules for construing the language of the Act. The learned author observes :

> " Where the language of an Act is ambiguous and difficult to construe the Court may for assistance in its construction refer to rules made under the provisions of the Act, especially where such rules are by the statute authorising them directed to be read as part of the Act "

It is stated on the authority of James and Mellish, L J. in *Ex parte Wire*[1], that

> " recourse may also be had to rules which have been made under the authority of the Act, if the construction of the Act is ambiguous and doubtful on any point, and if we find that in the rules any particular construction has been put on the Act, it is our duty to adopt and follow that construction "

Learned Counsel for the petitioner submitted that recourse to the rules and the form should not be resorted to in this case, as the rules and the form were not made contemporaneously with the section, and, therefore, would not be of any real assistance In support of his contention he relied on a Bench decision of this Court in *Rathinammal* v *Secretary of State*[2] The Bench while not questioning the correctness of the passage in Craies on Statute Law and the observation of James and Mellish, L J., in *Ex parte Wire*[1], observed that the rules were not made part of the Act, that there was no ambiguity in the wording of the proviso and that in the circumstances there was no need to call in aid the rules in the matter of interpretation The Bench was of the view that the rules went beyond the Act in that particular case In the case cited it was held that the wording of the proviso was free from ambiguity and that its effect was that no cess should be leviable under the Act in respect of land held under ryotwari settlement, which was classified and assessed as wet, unless the land be irrigated by using without due authority water from a source which was different from or in addition to that which had been assigned by the revenue authorities or adjudged by a competent Civil Court as the source of irrigation of the land In those circumstances the rules were found to go beyond the Act, as they were contrary to the proviso to the section That decision is therefore not helpful in deciding this case Relying on the observations in *Ex parte Wire*[1] Chagla, C J. in *Pramol Bhat* v *Kanwar Raj Nath*[3], held that in cases where there was ambiguity in the language used by the Legislature, or where more than one construction was possible, then the rules framed might help the Court in coming to the right conclusion as to the construction to be placed upon a particular provision in the law It was submitted on behalf of the Petitioner that the provisions of section 12 (1) of the Foreign Exchange Regulation Act being penal in nature should be construed strictly. A passage in Craies on Statute Law (6th Edition) at page 530 to the effect that unless

1. (1871) L R 6 Ch A 875 at 879.
2. (1939) 2 M L J 380 : A.I R. 1939 Mad. 963
3. 1954 Bom L.R. 873.

penalties are imposed in clear terms they are not enforceable and that when the Legislature imposes a penalty the words imposing it must be clear and distinct, was relied on At page 531 the position is summed up by the learned author as follows .

> " The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the Courts refusing on the one hand to extend the punishment into cases which are not clearly embraced in them, or equitable interpretation to exonerate parties plainly within their scope "

Learned Counsel for the petitioner strongly relied on a decision of the Bombay High Court in *Hamad Sultan* v. *Abrol*[1]. In that case it was found that the Statements made about the invoice value and the export value of the goods in the declaration submitted to the customs authorities and about the price in the invoice and the certificate submitted to the Exchange Control authorities were not correct. Dealing with the contention that in order to comply with the provisions of section 12 (1) of the Foreign Exchange Regulation Act, 1947 the declaration that is made must be a true declaration, the Court observed at page 111 .

> " In my view, the offence of violation of section 22 is committed by making a statement which the person making it knows or has reasonable cause to believe to be false or not true in any material particular That offence is distinct and different from the offence of violation of the provisions of section 12 (1) of the Foreign Exchange Regulation Act, 1947 The provisions of section 12 (1) are violated when no declaration is furnished at all or when the purported declaration is one which cannot be regarded as a declaration within the meaning of section 12 (1) of the Foreign Exchange Regulation Act, 1947."

The correctness of this statement standing by itself cannot be questioned But the learned Judge proceeded to observe that in his view whatever other offences the petitioner might have committed in making such statement, it could not be said that he had committed the offence of violating the provisions of section 12 (1) of the Act In coming to the conclusion the learned Judge was of the view that the requirements of section 12 (1) had been satisfied by the petitioner undertaking that he would deliver to the bank the foreign exchange proceeds resulting from the export of the goods. With respect I am unable to agree with the reasoning or the conclusion arrived at by the learned Judge. As already stated, on a construction of section 12 (1), I am of the view that the declaration contemplated is not only that the exporter had paid the foreign exchange resulting from the export of the goods, but also that the full export value given is the true value. The Calcutta High Court in *R. N Ghose* v. *Collector of Central Excise and Land Customs, Calcutta and others*[2], expressed its view as follows ·

> " These notifications impliedly suggest that the Customs Authorities might call for production of evidence for the purpose of being satisfied *prima facie* that the declaration as to ' full export value ' was correct especially in cases where they had reasons to believe that ' full export value ' had not been stated in the declaration furnished "

An attempt was made to suggest that the provisions of sub-section (2) of section 12 would apply in this case. A reading of the sub-section would show that the sub-section is applicable only to goods where the sale has not been completed. Sub-section (2) to section 12 is applicable to consignors of goods, that is persons entitled to sell or procure the sale of the goods, that is to a stage before the actual sale In such cases the permission of the Reserve Bank is required for doing or refraining from doing any act with intent to secure that the sale of the goods is delayed to an extent which is unreasonable or to secure payment for the goods otherwise than in the prescribed manner or where the payment does not represent the full amount payable by the foreign buyer It is admitted in this case that the goods had already been sold and the transaction of sale had been completed by the time the declaration was given Section 12 (2) has therefore no application

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1 Misc Application No 376 of 1957 in Compilation of Judgments in Customs Cases, 1958 compiled by the Central Board of Revenue at page 100

2. Matter No 78 of 1962 in Compilation of Judgments in Customs Cases, 1950 at page 107.

It was next contended by the learned Counsel for the petitioner that even assuming that section 12 (1) requires the exporter to give a correct full export value and an incorrect statement is made, it cannot have the effect of nullifying the declaration, thereby rendering the goods, which had been exported with the permission of the authorities, prohibited goods Learned Counsel for the petitioner, referred to the Foreign Exchange Regulation Rules, 1952, whereby the authorities are entitled to require any exporter to produce evidence for satisfying themselves that the invoice value stated in the declaration is the full export value of the goods The authorities after looking into the statement in the invoice and after perusing the evidence furnished by the exporter were satisfied about the correctness of their value and permitted the goods to be exported If subsequently it was discovered that the value was not correct in certain particulars, it was submitted that the effect will not be failure to comply with the requirements of section 12 (1) Learned Counsel pointed out that there may be variation of prices due to the quantity or quality or change in the market rate, which would result in the amount of full export value given not being the actual value realised by sale. Reference was made to the Income-tax Act where a return with false particulars is not treated as no return If there are incorrect particulars or false statements, punishments are provided for furnishing such incorrect particulars or false statements But the authorities are not empowered to proceed on the basis that no return had been submitted. Section 23 (4) of the Income-tax Act, 1922 provides that when a person fails to make a return, the Income-tax Officer shall make the assessments to the best of his judgment, whereas he cannot do so when an incorrect or incomplete, return is furnished. Section 271 of the Income-tax Act, 1961 deals with cases where the person fails to furnish information, while section 277 deals with furnishing of a false statement. The AdvocatesGeneral on behalf of the State relied on the decision in In re *Abhey Ramchunni Lal*[1], where it was held that section 23 (2) applied to an assessee who made a return which he knew that it was a *bona fide* return and in which he had put in his total income to the best of his then information, and yet there was some omission on his part due to some cause or other, but not to a case where the assessee deliberately failed to comply with the rule contained in section 22 (3) The Court expressed its view that a return which deliberately failed to comply with the rule contained in section 22 (2) that the return was to be of the total income of the assessee was no return at all within the meaning of that rule of law When the full export value given is correct, subject to variation of the particulars due to change in quantity or quality or fluctuation in the market rate, the full export value given cannot be said to be not true. But when the actual full export value of the goods was deliberately not given or a low value was given, as alleged in this case, for the purpose of secreting the balance of foreign exchange, it could not be said that the declaration regarding the full export value of the goods was given as required in the section. The result would be that the declaration will not be one according to the requirements of section 12 (1) The prohibition imposed by the Central Government regarding the export of goods would not stand lifted, as the requirements of this section remain unfulfilled The mere fact that the authorities at that time did not know the correct full export value of the goods or were induced to accept the figure given by the exporter and allowed the goods to be exported would not have the effect of removing the goods from the category of prohibited goods. A contravention of section 12 (1) of the Foreign Regulation Act, 1947 would be made out and the offence would be punishable under section 167 (8) of the Sea Customs Act, 1878

It was next contended by the learned Counsel for the petitioner that the notification of the Central Government dated 4th August, 1947, prohibiting the export of all goods is contrary to the powers vested on it under section 12 (1) of the Act It was submitted that what section 12 (1) empowered the Central Government was to prohibit the export of any goods or class of goods specified in the notification, and not all goods as they have done in the notification. Reference was also made to section 19 of the Sea Customs Act where the Central Government is empowered to prohibit the bringing into or taking out of India the goods of any specified descrip-

1. A.I.R. 1933 All. 197.

tion In Stroud's Judicial Disctionary (3rd Edition) the meaning of the word 'any' is given as 'a word which excludes limitation or qualification'. In *Victorian Chamber of Manufactures* v *The Commonwealth*[1], the High Court of Australia in construing the words in Regulations 22 (1) and 22 (2) of the National Security (Prices) Regulations empowering the Minister to 'declare any goods to be declared goods' and 'any service to be a declared service' for the purpose of the Regulations, held that declarations by the Minister of 'all goods in the possession or under the control of any person in Australia' and of 'all services supplied or carried on in Australia' were authorised by Regulation 22 (1) and (2) respectively At page 340 it was held that the Minister had the power to declare any goods or any services to be declared goods or services and that it was obvious that under such a power he might declare some or all goods or services. At page 345 dealing with the contention that the Minister must specifically describe the goods, the price of which he considered should be controlled, the Court held that, if the regulation required that the classes of goods should be described, there would be considerable substance in the contention, but the Regulation empowered the Minister to declare any goods to be declared goods for the purposes of the regulation Relying on the definition of the word 'any' in Stroud's Judicial Dictionary, the Court held.

"'Any goods' therefore includes all goods except where this wide construction is limited by the subject-matter and context of a particular statute "

The contention of the learned Counsel for the petitioner that the Central Government acted beyond the scope of section 12 (1) in notifying all the goods cannot therefore be accepted.

It was next contended that rule 3 of the Foreign Exchange Regulation Rules, 1952, which requires the exporter to make a declaration in the prescribed form G R 1 that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer, is *ultra vires* of the powers conferred on the Government This contention has to be rejected, in view of my holding that section 12 (1) by itself contemplates a declaration that the invoice value declared is the full export value of the goods. Further, the Government is also empowered to frame rules prescribing forms and circumstances of their use under section 27 of the Foreign Exchange Regulation Act Further, section 12 (1) itself refers to declaration supported by such evidence as may be prescribed, that is by rules. Section 12 (1) will have to be read along with the rules framed and the forms prescribed and the rules cannot be said to be invalid as beyond the rule making powers of the Government.

It was next contended that section 23-A of the Foreign Exchange Regulation Act was amended by Act LV of 1964 and the provisions which deemed the restriction imposed by sub-section (1) of section 12 to have been imposed under section 19 of the Sea Customs Act had been repealed The amended section provides that the restrictions imposed by sub-section (1) of section 12 and other sub-sections referred to shall be deemed to have been imposed under section 11 of the Customs Act, 1962. It was further pointed out that after the repeal of the Sea Customs Act, 1878, by Customs Act LII of 1962 no further proceedings can be taken for contravention of the provisions of section 12 (1) of the Foreign Exchange Regulation Act before the amendments were introduced The offences relate to export of mineral ores in 1956 and 1957 long before the amending Act LV of 1964 and the repeal of Sea Customs Act, 1878, by Customs Act LII of 1962 Section 6 (*e*) of the General Clauses Act, 1897 is a complete answer to this contention. Section 6 (*e*) of the General Clauses Act may be extracted:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not (*e*) affect investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed "

1. 67 Common Wealth Law Reports 335.

Unless a different intention appears, the repeal shall not affect any investigation, or legal proceeding and any such investigation or legal proceeding may be instituted or continued as if the repealing Act or Regulation had not been passed In *State of Punjab* v *Mohar Singh*[1], it was held at page 88 as follows·

"Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears In the case of a simple repeal there is scarcely any room for expression of a contrary opinion"

This contention has therefore to be rejected.

In the result all the contentions raised by the learned Counsel for the petitioner fail and this petition in dismissed with costs For the reasons given in this judgment Writ Petitions Nos 1592 to 1594 of 1966 and 1601 of 1966 are also dismissed with costs Counsel fee Rs 250 in each Writ Petition.

V K ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT—MR JUSTICE K VEERASWAMI AND MR JUSTICE M NATESAN.

M K Subbachariar and others .. *Petitioners**

v.

State of Madras by the Secretary to Government, Revenue Department, Fort St. George, Madras and others .. *Respondents.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963)—*Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of* 1963)—*Madras Leaseholds (Abolition and Conversion into Ryotwari) Act (XXVII of* 1963)—*All the above three Acts are constitutionally valid—Legislation competent under Entries* 18 *and* 45 *of List II and Entry* 42 *of List III—Subject-matter of enactments are "estates"—Saved by Article* 31-*A of the Constitution of India—Provision for just compensation not inherent in Entry* 42 *of List III—Provisions made in the Acts for wiping out of arrears of rent are valid—Not unrelated to agrarian reform—Effect and reasonableness of sections* 27, 30 (1), 31 *and* 32 *of Madras Act XXVI of* 1963—*Drastic cut in income of religious institutions as a result of the enactments—Not violative of Articles* 25 *and* 26 *of the Constitution—Acts not contrary to Crown (Government) Grants Act,* 1895

Constitution of India (1950) *as amended by the Constitution (Seventeenth Amendment) Act* (1964), *Articles* 25, 26 *and* 31-*A*—"*Law*" *in first Proviso to Article* 31-*A*—*Meaning of—Assent of President under—Effect—Propriety of President's action if justiciable—Word "inam" in the definition of "estates" in Article* 31-*A* (2) (a) (*i*)—*Proper construction—Scope of Articles* 25 *and* 26

Inams—Class, nature, character and origin of inams tenures in South India

Madras Inams (Assessment) Act (XL of 1956)—*Effect of levy of assessment under, on inams*

Crown (Government) Grants Act (XV of 1895)—*Scope and applicability*

The three Madras Acts, the Madras Inams Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) and the Madras Leaseholds (Abolition and Conversion into Ryotwari) Act (XXVII of 1963) are not void for lack of legislative competency and there is no room for assailing them with the picturesque and epigrammatic expressions that the enactments are a "fraud on the Constitution" or a "fraud on power".

The three impugned Acts are fully covered by Article 31-A of the Constitution of India as amended by the Constitution (Seventeenth Amendment) Act, 1964 and having received the assent on the President thereunder are protected from attack against their constitutionality on the score of any of the provisions of the Acts being violative of the fundamental rights guaranteed under Articles 14, 19 and 31 of the Constitution.

The provisions of the Acts *ex facie* fall under Entries 18 and 45 of List II and Entry 42 of List III of the Seventh Schedule to the Constitution of India

The contention that the laws being violative of the Constitutional guarantees under Articles 14, 19 and 31 the President should not have given his assent under Article 31-A and the assent given is therefore a nullity is meaningless and unsound The very purpose of reserving the Bill under Article 31-A is to cure its invalidity It must be in the consciousness that the Bill would be attacked as void being in contravention of Articles 14, 19 and 31 that the Bill is submitted to the President for his assent under Article 31-A The protective article itself proceeds on the basis that the law may be void as

1 A I R 1955 S C. 84

* W. P Nos 1552, etc. of 1965. 24th June, 1966

inconsistent with or taking away or abridging the rights conferred under Article 14, 19 or 31 Once the absence of legislative competency from violations of Articles 14, 19 and 31 is cured by the President's assent, the law cannot be challenged as a fraud on powers for transgression or rights guaranteed under those Articles

Besides, though the broad principles on which the assent of the President is intended to be given or withheld from a reserved Bill may be deducible, they are not specifically laid down in the Constitution That being so it will not be open to the Courts to question the propriety of the President's action It is the subjective opinion of the President that leads to the assent and is not justiciable

Nor has the cognate contention any force that a law violative of fundamental rights is void at its inception and as such is a still-born law and that to such a law there can be no assent under Article 31-A as the " law " under Article 31-A which is reserved for the President's consideration can only mean a valid law If this contention is accepted it will render Article 31-A nugatory A reading of Articles 31 and 31-A shows that in the context the word " law " in the first proviso to Article 31-A cannot be understood in its strict sense Article 31-A assumes that the legislation in question is open to attack under Article 14, 19 or 31 The word " law " appears to have been used in a compendious way describing also a legislation that has been passed through the Legislature of a State and not yet received the assent of the President It only means just a Bill passed by Legislature of a State

The subject-matter of the three impugned Acts namely, " the existing inam estate ", " the new inam estate ", " the minor inam " and " the leasehold village " are all " estates " within the meaning of that term in Article 31-A (2) (*a*) and as such are protected under Article 31-A each of them having received the assent of the President under the first proviso thereof

For details regarding the grounds on which it was contended that the " existing inam estate", the "new inam estate " and the " minor inams " were not " estates " within the meaning of Article 31-A (2) (*a*), (*See* judgment) There was no serious argument that " leasehold villages " would not come under the expression " estate " in Article 31-A)

The argument that the word " inam " in clause (2) (*a*) (1) of Article 31-A as it now stands after the Constitution (Seventeenth Amendment) Act, 1964 should be construed in *ejusdem generis* sense as to include only an inam that was an estate on the date the Constitution India came into force, is untenable In other words, the argument that by a mere post-Constitution definition a property which was not an estate previously cannot be brought under the expression " estate " is unsound When the expression used in the Article is " and shall also include any *jagir*, *inam*, etc." we cannot limit inams to any particular category, to inams which were estates under the local law prior to the 26th of January, 1950 only. There is no restriction on the content of the word " inam " as to require it so satisfy the definition of estate in the local area.

The contention that there could be no law for acquisition under Entry 42 of List III, Schedule VII of the Constitution of India without providing for compensation and that the competency of a Legislature to make a law for acquisition under that entry is conditional on its providing just equivalent of the property acquired and that otherwise the law would be void for lack of competency of Legislature, is devoid of any substance The provision for compensation is not inherent in Entry 42 of List III and the obligation to provide compensation since the Constitution (Fourth Amendment) Act, 1955 is found only in Article 31 (2) and when an Act is shielded from that Article by the assent of the President under the first proviso to Article 31-A, it is immune from all attacks based on the requirements as to compensation, even if the compensation provided is illusory or no compensation is provided for

Hence the three impugned Acts cannot be assailed as a piece of colourable legislation or a legislation in fraud of power on the ground that the compensation provided for the acquisition of the estates is only illusory Nor can they be questioned on the ground that no compensation whatsoever has been provided for one or more specific interests in the estates acquired

Nor has the contention any force that at any rate the sections of the three impugned Acts (section 56 of Madras Act XXVI of 1963, section 43 of Madras Act XXVII of 1963 and section 41 of Madras Act XXX of 1963) providing for a tenant securing extinguishment and discharge of arrears of rent at his option by depositing a fraction of the rent in arrears even in cases where the arrears have merged in decrees are void as lacking legislative competency and violative of constitutional guarantees

The impugned provisions are within the legislative competency of the State Legislature under Entry 18 of List II of Schedule VII of the Constitution of India and no question of colourable legislation can arise The field of legislation under that entry covers ' relation of landlord and tenant ' and ' collection of rents '. There is no reason to limit the content of the entry, particularly the words ' the collection of rents '. It can well include remission of rents.

There can be no doubt that any scheme of agrarian reforms and bettering of the conditions of the agriculturists who work on land can properly envisage lightening the burden on them of accumulated arrears of rent Provisions in this regard are legitimately ancillary to land reforms and get integrated with the core of necessary agrarian legislation Also Article 31-A covers not only legislation for the acquisition by the State of any estate or of any right therein but also legislation for the extinguishment or modification of any rights in estates.

Taking the ryotwari demand as a basis of compensation for the acquisition may adversely affect the quantum of compensation but certainly the process of ascertaining the basic annual sum by reference to the ryotwari demand as done by Madras Act XXVI of 1963 is not so unrelated to the object that it cannot be regarded as a relevant principle on which compensation may be determined Nor is the manner of computation of net miscellaneous revenue, which is one of the components of the basic

annual sum, as provided by section 27 of the Madras Act XXVI of 1963 can be said to be so artificial and divorced from reality as to be termed not a principle for ascertainment of compensation

It cannot be said that the reduction in the income of religious institutions and mutts under the provisions of a statute relating to land reforms affects the fundamental rights of these institutions guaranteed under Articles 25 and 26 of the Constitution of India, even if by the reduction of the income the institutions will not have sufficient income to maintain themselves and to perform their religious obligations The guarantee under the Constitution protects the freedom of religious opinion and also acts done in pursuance of a religion While the State cannot regulate the religious practices, there is no bar against statutes which may affect the activities of religious bodies which are economic or commercial in character, for the reason that the statutes may affect the income of the religious bodies Article 26 guarantees to religious denominations only right to acquire and own property and administer the property in accordance with law but does not prevent properties belonging to a religious body being acquired by authority of law.

Hence the argument that the effect of the impugned Acts, which effect drastic cuts in the income of religious institutions, would result in violation of Articles 25 and 26 of the Constitution of India is without any substance.

The provisions of the impugned Acts (as for instance sections 27, 30 (1) and 32 of the Madras Act XXVI of 1963) may fall on the inamdars very harshly in particular cases and there may be drastic cut in their income But Courts are not concerned with the wisdom or discreetness of the policy embodied in legislation but only with its constitutional validity If in pith and substance the legislation is within the ambit of the Legislature's competency the motive behind the legislation is totally irrelevant It may be that particular institutions or individuals are hit hard by the Acts but that cannot by itself invalidate the legislation

Section 31 of the Madras Act XXVI of 1963 which provides for the determination of the total compensation payable in cases not governed by section 32 of that Act is clearly discriminatory and violative of Article 14 of the Constitution of India But as the Act is covered by the President's assent under Article 31-A the provisions of section 31 cannot be struck down under Article 14

The fact that the impugned Acts are fully covered by Article 31-A of the Constitution does not preclude the contention that particular properties sought to be covered by Act XXVI of 1963 and Act XXX of 1963 are not inams at all as to come under the purview of the Acts There can be no doubt that when any property had ceased to be an inam when the relevant Acts came into force it would not vest in the Government as an inam estate or minor inam as the case may be

Inams fall into two broad classes, major and minor inams When the grant is of the whole village it is called a major inam When the grant is not of a village but of isolated fields or blocks of land in a village or share or shares in a village, that is a grant of something less than a village, it is known as a minor inam

The word inam by itself is an Arabic word introduced in India after the Muhammadan conquest, the term used before that being *Manyam*

The two expressions commonly used in regard to land tenures in the State of Madras is melwaram and kudiwaram Strictly the sovereign's right to collect a share of the produce from the cultivated land is known by the name melwaram and the share of the ryot or cultivator is known by the name kudiwaram The relationship between melwaramdar and kudiwaramdar has been generally equated to co-ownership

The essence of an inam is that there should be a grant or gift, a favour by the grantor of land of melwaram also, or gift or giving up of melwaram in favour of the holder of the land, that is the kudiwaramdar Or it may be an assignment of melwaram to a person not in occupation of the land. The grant or assignment of melwaram may be the entirety of melwaram or a share or fraction therein In order to constitute a grant an inam, the mere use of the expression " inam " or " gift " is wholly inconclusive unless along with that expression we find an indication that the grantee was to enjoy the land either totally free of rent or to have partial remission of the Government share of the revenue

(For history and origin of inam tenures *see* judgment)

The Madras Inams (Assessment) Act (XL of 1956) empowers the State to levy full assessment on certain inam lands *Prima facie* it may be said that where the inam grant is only of the assessment, whether whole or partial, if full assessment is levied, the inam gets extinguished , it could no more be said to retain its essential inam character It would tantamount in effect to resumption of the inam. So with reference to any particular gift if as a result of the assessment under the Madras Inams (Assessment) Act (XL of 1956) there is nothing of the gift, benefit or favour left, there will be no inam for the Madras Acts XXVI and XXX of 1963 to act upon

The three impugned Madras Acts are also not contrary to the Crown (Government) Grants Act of 1895 The provisions of this Act are intended only to give validity to conditions imposed by the Government in respect of Crown lands even though the conditions might not be in conformity with the law of the land. The Crown (Government) Grants Act does not preclude the Government from altering modifying or from extinguishing the grants made whose validity could be sustained under the Act.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the notification G O.P.

No 781, Revenue, dated 12th March, 1965, and published in the *Fort St. George Gazette*, dated 15th March, 1965, in Part II section 1 and to quash the same in so far as it relates to the village of Maniya Adur in South Arcot District, etc. etc

V. Vedantachari, K. Parasaran, K. Sarvabhauman, K. S. Champakesa Iyengar, P. Sivaramakrishnaiah, N. Srivatsan, R. Gopalaswami Iyengar, T. M. Chinnaya Pillai, S. M Amjad Nainar, K. S. Desikan, T.V. Balakrishnan, K. Rajah Iyer, R. Rangachari, G. N. Chary, T. K. Subramania Pillai, T R. Thyagarajan, T. R. Ramachandran. K. S. Sankara Iyer, G. Ramanujam, K. Yamunan, P Narasimhan, V.V. Raghavan, V. Shanmugham, K. S. Naidu, R. Kunchithapatham, K. Ramaswami, R Sundaralingam, R. Ramamurthi Iyer, N. C. Srinivasan, P. Balasubramaniam, N. R. Chandran, S. Bhaskaran, G. Krishnamurthi Iyer, A. Sundaram Iyer, S. M. Subramaniam, S. V. Rama Iyengar, N. Appu Rao, B. Punyakoti Chetty, A. S Raman, K. Raman, T. R. Srinivasan, and *R. Sundaravaradan,* for Petitioners

The Advocate-General and *K. Venkataswami,* for the Additional Government Pleader, *R. Shanmugam, K. V. Sankaran, S. Mohan* and *K. S. Sankara Iyer,* for Respondents.

The Judgment of the Court was delivered by

Natesan, J—In this batch of writs under Article 226 of the Constitution of India, the constitutional validity of three Acts of the State Legislature are under challenge. These three Acts, the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) and the Madras Leaseholds (Abolition and Conversion into Ryotwari) Act (XXVII of 1963), hereinafter referred to for convenience as Inam Estates Act, Minor Inams Act and Leaseholds Act respectively, are steps in the final phase of the series of legislation in carrying forward the country's policy of agrarian reforms, the first effective step having been taken so early as in 1948 when the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) was passed. Under Act XXVI of 1948, the intermediaries in the Zamindari and under-tenure estates and whole inam villages in which the grant consisted of Melwaram alone were abolished and the ryotwari settlement introduced The objective of the three present enactments is the introduction of ryotwari settlement in respect of lands held under certain inam and leasehold tenures under the Government, left out in the Estates Abolition Act The pattern of legislation in the matter of abolition and conversion and providing for ryotwari settlement is more or less in the line of Madras Act XXVI of 1948, a departure from the Act being made wherever necessitated by reason of difference in tenures Though the petitions now before us fall under three groups, as the main plank of attack as to the constitutional validity is common, they all have been heard together The principal grievance of the petitioners is that the provisions relating to the payment of compensation are so framed as to make the compensation illusory The provisions regarding the grant of ryotwari pattas are termed arbitrary and discriminatory and as having no relation to the tenures under which lands have been held. Particular attack is made in regard to the provision in the Acts for wiping of arrears of rent. The petitioners charge the Legislature with committing a fraud on power to deprive the absolute proprietors of lands of their rights in property and the rents in arrears under the guise of agrarian reforms for the abolition of intermediaries and settling the lands on the actual cultivators Some of the petitioners are religious and charitable endowments and some of them are mutts , and it is contended for these religious institutions that the effect of the Acts would result in the violation of Articles 25 and 26 of the Constitution It is urged that Article 31-A of the Constitution cannot protect the Acts in question , nor Article 31 (2) stand in the way of judicial scrutiny of the provisions relating to compensation The State seeks to sustain the validity of the Acts by reference to Entry 18 and Entry 45 in List II and Entry 42 in List III of Schedule VII to the Constitution and relies for protection from attacks based on Articles 14, 19 and 31 of the Constitution, on Artile 31-A, while at the same time contending on the merits that the provisions in the Acts on all aspects are unimpeachale fair and reasonable.

It will be convenint to take up for consideration first, the Inam Estates Act (XXVI of 1963) Writ Petition Nos 1457 and 1552 of 1956 are typcical of the inams covered by the Act and a brief reference to the facts therein would be sufficient for our present purpose Writ Petition No 2586 of 1965 is one of a group of writs relating to what the Act defines as Pudukkotta Inam Estates The petitioner in Writ Petition No 1457 of 1965 is a religious institution Abisheka Kattalai, Sri Thyagarajaswami Devasthanam, Tiruvarur, represented by Sri La Sri Ajapa Nateswara Pandara Sannadhi and the Executive Officer of the Devasthanam The petitioner is the inamdar of the inam villages Elandavancheri, Palavoy, Thyagajapuram Kamalalayam Kattalai, Chandrasekaranpettai, Karimbiyur Thottam, Ammakattalai and Vellapillaiyar Kattalai in Thanjavur District These villages were made estates under the Madras Estates Land (Third Amendment) Act XVIII of 1936). In some of these villages—for instance in Thiagarajapuram—the entire lands are private lands The villages were held on service tenures for Abshekam service to the presiding deity Lord Thiagarajaswami and other deities. With reference to the lands situated in Thiagarajapuram and Palavoy, as to their private character, there was a litigation which ended ultimatedly in compromise in the Supreme Court in Civil Appeal Nos 141 to 143 of 1955 Under the compromise it was recognised that the lands were private and not ryotwari and that the tenants had no occupancy rights in them The Devasthanam had to grant a lease of the suit wet and dry lands to the respondents in the said appeals for a period of 25 years beginning from 1st July, 1950, with an option for renewal in favour of the tenants for a further period of 25 years Now these villages are notified as 'existing Inam Estates' under the aforesaid Act XXVI of 1963 on 15th March, 1965.

Writ Petition No 1552 of 1965 relates to the Inam village Maniya Adur in Chidambaram Taluk, South Arcot District. In this case the grant was not of a whole village or a named village, and a portion of the village about 26 acres and odd have been retained by the grantor at the time of the original grant and subsequently granted to a mosque The village did not become an estate under the provisions of the Estates Land Act (Third Amendment) Act XVIII of 1936 When the Government wanted to apply the provisions of the Madras Estates Land (Reduction of Rent) Act (XXX of 1947) to the suit village, the inamdar instituted a suit, O S No 59 of 1954 on the file of the Subordinate Judge, Cuddalore, impleading the State as a party defendant, and therein a declaration was obtained that the village was not an estate as defined under section 3 (2) (*d*) of the Madras Land Act and that the Rent Reduction Act was not applicable to the village in question. There was an appeal by the State to this Court in A S No 566 of 1955, and this Court on 5th January, 1959, confirmed the decision of the trial Court and held that the inam in question was not an estate Now this village has also been included in the notification issued under section 1 (4) of the Inam Estates Abolition Act on 15th March, 1965 This village comes under the Act as 'a new inam estate', though it is only part of a village granted in inam and therefore not an 'estate' as defined under the Madras Estates Land Act, 1908 Inam Nilayappatti, a Pudukottai inam estate, the subject of Writ Petition No 2586 of 1965 had its origin in the grant of the village by a sovereign prince of Pudukkottai and the inam was subsequently settled in 1912 under the Pudukkottai Inam Settlement Rules of 1888. On the merger of the Pudukkottai State with the Indian Union, Madras Act XXIII of 1955, the Pudukkottai Settlement of Inams Act, was passed providing for the recognition of inams granted, confirmed or recognised by the Pudukkottai Administration and Settlement of the Inams The Special Officer, Inam Settlement, Pudukkottai, found that Inam Nilayappatti and 81 other villages are whole inam iruwaram grants of villages We may state that no special point was made with reference to Pudukkottai inams, as such

The Inam Estates Act received the assent of the President on the 11th day of December, 1963, and was first published in the *Fort St. George Gazette* on the 1st of January, 1964 It extends to the whole of the State of Madras except the Shencottah taluk of the Tirunelveli District, the Kanyakumari district and the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Altera-

tion of Boundaries) Act, 1959. Under sub-section (4) of section 1 of the Act certain provisions of the Act come into force immediately. The rest of the provisions were by notification published on 15th March, 1965, brought into force with effect from the 15th day of April, 1965, in respect of the Inam estates specified in the notification The Act is made applicable to all inam estates and an inam estate is defined in section 2 (7) as meaning an ' existing inam estate ' or a ' new inam estate' An ' existing inam estate ' is defined by section 2 (4) to mean an inam village which became an estate by virtue of the Madras Estates Land (Third Amendment) Act, 1936 (XVIII of 1936) A 'new inam estate ' is defined to mean a ' part village inam estate ' or a ' Pudukkottai Inam estate ' A part village inam estate is defined by section 2 (11) as a part of a village including a part of a village in the merged territory of Pudukkottai the grant of which has been made, confirmed or recognised by the Government notwithstanding that subsequent to the grant, such part has been partitioned among the grantees or the successors-in-title of the grantee or grantees *Explanation* 1 to the definition is of importance Under *Explanation* 1 (*a*) where the grant of a part of a village as an inam is expressed to be a specified fraction of, or a specified number of shares in, a village, such part shall be deemed to be a part village inam estate notwithstanding that such grant refers also to the extent of such part in terms of acreage or cawnies, or of other local equivalent *Explanation* 1 (*b*) excludes from the definition of a part village inam estate, the area which forms the subject-matter of a grant, where the grant as an inam is expressed to be only in terms of acreage or cawnies Pudukkottai Inam estates are inam villages in the merged territory of Pudukkottai and set out in schedule to the Act The consequence of a notification under the Act is set out in Chapter II By section 3 (*b*) the entire inam estate (including all communal lands and porambokes, other non-ryoti lands, waste lands, pasture lands, forests, mines and minerals, quarries, rivers and streams, tank and irrigation works, fisheries and ferries) shall stand transferred to the Government and vest in them, free of all encumbrances, and the Madras Revenue Recovery Act, 1864, the Madras Cess Act, 1965, and all other enactments applicable to ryotwari areas are made applicable to the inam estates There are provisions in the Act for survey and settlement operations and introduction of Ryotwari settlement. Section 9 specifies the class of lands in respect of which the landholder would be entitled to ryotwari patta Section 10 specifies the lands in respect of which a ryot is entitled to ryotwari patta Section 11 provides for a case where no person is entitled to a ryotwari patta under section 9 or section 10 A ryotwari patta is granted under this section on the basis of personal cultivation as detailed in the section The provision relating to the payment of compensation is found under Chapter VI and by section 23 compensation shall be determined for an inam estate as a whole and not separately for such of the interests therein Section 24 provides for the determination of a basic annual sum and the compensation payable in respect of an inam estate except inam estate belonging to religious, educational and charitable institutions is by section 31 made up of multiples of the basic annual sum, in a descending scale the multiplier going down with the increase in quantum of the basic annual sum. The basic annual sum by section 25 is the aggregate of two sums, less certain deductions provided in sction 28 ; (1) the whole of the gross annual ryotwari demand in respect of all lands in the inam estate, in respect of which any person other than the landholder is entitled to a ryotwari patta as ascertained under section 26 less the deduction specified therein, and (2) the whole of the average net annual miscellaneous revenue derived from all other sources in the inam estate specified in clause (*b*) of section 3 but not including lands in respect of which the land holder is entitled to a ryotwari patta as ascertained under section 27. Section 27 provides that the net annual miscellaneous revenue shall be the average of the net annual income derived by the Government from such sources during the fasli year commencing on the notified date, if such date was the 1st day of July, or on the 1st July, immediately succeeding the notified date, if such date was not the 1st day of July and the next fasli year in case ryotwari settlement is effected in that year or the next two fasli years in other case Section 30 (1) excludes from the computation of the basic annual sum, the ryotwari assessment imposed on all lands in an inam in respect of which any person including a landholder is entitled to ryotwari patta under

section 11 of the Act. Religious, educational and charitable institutions are under section 32 to be paid compensation by an annual allowance called tasdik allowance. There are special provisions relating to inam estates held on condition of rendering service to religious institutions. Section 56 makes provision for collection of rents in arrears accrued prior to the notification and it entitles the tenant to secure a discharge of the balance of rents due on making certain payments even in cases where decrees of the Courts have been obtained It is unnecessary for our present purpose to go into greater details of the enactment As stated at the outset, the provisions in the Act generally follow those in the Estates Abolition Act (Madras Act XXVI of 1948) relating to Zamindari and Melwaram inam estates The important deviation is in regard to compensation. While under Madras Act XXVI of 1948 basic annual sum in respect of a melwaram inam estate is arrived at by deducting from the aggregate of the gross annual ryotwari demand and the net annual miscellaneous revenue, the jodi, quit rent, kattubadi, etc , payable by the landholder to the Government or to the landholder of another estate, under the present Act, besides the jodi, quit rents or other amounts payable annually, the whole of the assessment levied on any land in an inam estate under the Madras Inams (Assessment) Act (XL of 1956) in respect of which the landholder is entitled to a ryotwari patta, is also deducted.

Learned Counsel examined elaborately the various provisions of the Act with a view to show that the compensation which is purported to be provided by the Act has been by various shifts and devices reduced to an illusory figure. The attempt of learned Counsel has been to make out that the principles laid down in the Act for computation of the compensation operated in reality to cut down the compensation and the provisions relating to compensation are in truth a fraud on the Constitution being a colourable legislative expedient to acquire property without payment of compensation. The gravamen of the complaint is as to the provisions for compensation There is no dispute that the acquisition and the vesting of the property in the State is in the process of land reforms, a public purpose Now since the Fourth Amendment of the Constitution in 1955, no law for acquisition by the State of property for a public purpose can be questioned on the ground that the compensation provided for is inadequate So long as the law provides for compensation, either fixing the amount or laying down the principles for determination of the compensation, even if the compensation is inadequate, Article 31 (2) precludes challenge Of course compensation even under the amended Articles 31 (2) has to be the 'just equivalent' of what the owner is deprived of and the principles should be provided for ascertaining the compensation It is pointed out by the Supreme Court in *Vajravelu* v *Special Deputy Collector for Land Acquisition, West Madras*[1], at page 1024.

" Under amended article, the law fixing the amount of compensation or laying down the principles governing the said fixation cannot be questioned in any Court on the ground that the compensation provided by that law was inadequate If the definition of 'compensation' and the question of justiciability are kept distinct, much of the cloud raised will be dispelled

The argument that the word 'compensation' means a just equivalent for the property acquired and, therefore, the Court can ascertain whether it is a 'just equivalent' or not, makes the amendment of the Constitution nugatory It will be arguing in a circle Therefore, a more reasonable interpretation is that neither the principles prescribing the just equivalent nor the just equivalent can be questioned by the Court on the ground of inadequacy of the compensation fixed or arrived at by the working of the principles

On the other hand, if a law lays down principles which at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31 (2) of the Constitution If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed a fraud on power and, therefore the law is bad It is a use of the protection of Article 31 in a manner which the Article hardly intended "

The arguments for the inamdars proceeded on the premises that the protective mantle of Article 31-A of the Constitution does not shield the Act from judicial

1 (1964) 2 S.C.J. 703 (1964) 2 M.L.J. A.I.R. 1965 S.C. 1017 (1024). (S.C.) 173. (1964) 2 An.W.R. (S.C.) 173;

scrutiny as to its validity from the standpoint of Articles 14 and 31 (2) of the Constitution The State would take its stand, however vulnerable the Act may be, behind the bar which, it is stated it has been able to secure under Article 31-A as unsurmountable For the State it is also said that none of the provisions of the Act are discriminatory or violative of any of the guaranteed fundamental rights Adverting to the provisions relating to the grant of ryotwari pattas and the requirement as to personal cultivation, it is submitted that the inamdars of the estate dealt with under the Act form a separate and independent class by themselves and cannot claim equal treatment with inamdars who can claim only melwaram rights The inamdars in question are either grantees of both the warams or grantees of melwaram while already owning the kudiwaram It is pointed out by the State that the requirement as to personal cultivation could not be held unreasonable even in respect of religious and charitable institutions, as the personal cultivation required is cultivation by the landholder himself by his own servants or by hired labour with his own servants or hired stock in the course of husbandry The very object of agrarian reforms is to assure the land to the actual cultivator that he may put forth his best efforts on the land and secure the maximum yield therefrom The provisions regarding grant of ryotwari patta are not aimed at depriving the holder of his lands but at securing better return from the lands Courts, however, are not concerned with the wisdom or discreetness of the policy embodied in legislation, but only with its constitutional validity. Courts have to see that constitutional limitations are not evaded by resort to colourable devices, but once the legislation is in its true nature and character within the competence of the Legislature, there is no question thereafter of any fraud on legislative power If in pith and substance the legislation is within the ambit of the Legislature's competency, the motive behind the legislation is totally irrelevant. The doctrine of fraud on the Constitution or colourable legislation, we may state, does not refer to any question of *bona fides* or *mala fides* on the part of the Legislature. The whole doctrine resolves itself into the question of competency of the Legislature to enact the particular law If the Legislature is competent to pass a particular law, the motive which impelled it to act are really irrelevant (see *Gajapathi Narayan Deo* v. *State of Orissa*[1],) Legislative power in relation to any subject-matter is capable of abuse, but it is not to be assumed that there has been an abuse or that it has been improperly used. If the legislation is oppressive while within the competence of the Legislature the remedy is appeal before a different forum, to the representatives in the Legislature and if their conscience is not scared, to the electorate, and not striking down of the legislation by Courts The power of the Legislature, it needs no emphasis, is only to make laws within its legislative competence may be circumscribed by specific legislative entries under Schedule VII of the Constitution or limited by the fundamental rights guaranteed under the Constitution The Legislature cannot transgress the field of its competency either directly or indirectly and the Courts can scrutinise the law to ascertain whether the Legislature by any device purports to make a law which is ostensibly within its field and competence, yet in effect and substance goes beyond it. In *Ladore* v. *Bennet*[2]. Lord Atkin made the dicta·

"It is unnecessary to repeat what has been said many time by the Courts in Canada and by the Board that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field A colourable device will not avail"

In *Vajravelu* v. *Special Deputy Collector*[3], Subba Rao, J., speaking for the Court observes:

"When a Court says that a particular legislation is a colourable one, it means that the Legislature has transgressed its legislative powers in a covert or indirect manner, it adopts a device to outstep the limits of its power Applying the doctrine to the instant case, the Legislature cannot make a law in derogation of Article 31 (2) of the Constitution It can, therefore, only make a law of acquisition or requisition by providing for 'compensation' in the manner prescribed in Article 31 (2) of the Constitution If the Legislature, though *ex facie* purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation it will be exercising power it does not possess If the Legislature makes an illusory compensation or by

1. A I R. 1953 S C. 375 at 379
2. L.R. (1939) A.C. 468 at 482.
3 (1964) 2 S C J. 703 : (1964) 2 M.L J. (S.C.) 173 : (1964) 2 An W.R. (S.C.) 173

indicating the principle for ascertaining the compensation which do not relate to the property acquired or to the value of property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its powers Briefly stated the legal position is as follows. If the question pertains to the adequacy of compensation, it is not justiciable, if the compensation fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of powers in the sense we have explained, the question is within the jurisdiction of the Court "

But the limitation on legislative powers in the matter of acquisition and requisitioning under Article 31 (2) are lifted where Article 31-A applies An Act protected by Article 31-A, even if it violates the requirements of Article 31 (2) and provided only illusory compensation or principles for ascertaining compensation so wholly unrelated to the matter and arbitrary as to make it impossible for the expropriated owner to secure any compensation, will not be open to challenge as a piece of colourable legislation or a legislation in fraud of powers.

Mr Vedantachari, learned Counsel who led the attack for the inam holders attempted a three pronged drive to take the Act out of its cover under Article 31-A and expose it for invalidation under Articles 14 and 31 (2) Though several of the provisions of the Act were characterised as unreasonable, no specific mention was made of Article 19 evidently in view of the continuance of the proclamation of emergency The challenge to the availability of Article 31-A for the State with reference to Inam Estates Act may be briefly summarised thus . (1) the first is a direct attack on the validity of the assent of the President aided by a flanking movement. When securing the assent of the President to the Bill as provided under Article 31-A, the President was apprised of and the attention of the President drawn to the true effect of the provisions of the Bill relating to compensation which are illusory making the Act really confiscatory and a fraud on the Constitution. Hence the assent is a nullity The flanker is that a law violative of fundamental rights is void at its inception and so a still-born law To such still-born law there can be no assent as the first proviso to Article 31-A (1) contemplates only a law made by the Legislature of a State being reserved for the consideration and assent of the President ; (2) Neither the property defined as 'existing inam estate' or the property defined as 'new inam estate' are estates as required under Article 31-A of the Constitution Still less are minor inam estates As regards an existing inam estate, though it comes under the definition of estate under the Madras Estates Land Act, 1908, as the amending Act, Madras Act XVIII of 1936 under which it was made an estate, was *ultra vires* of the then Legislature and therefore void. The definition cannot, therefore, be availed of (3) Thirdly, it is contended that it is implicit in the very concept of the expression acquisition in Entry 42 of the Concurrent List that there should be compensation and the compensation should be the just equivalent of what the owner has been deprived of It is stated that provision of compensation is a restriction on the power for acquisition and that the competency of a Legislature to make a law for acquisition is conditional on its providing the just equivalent of the property acquired as compensation There could be no law for acquisition without compensation, and where there is no true compensation the law is void for lack of competency of the Legislature and the assent of the President would not cure such law For the assent to give validity it must be within the competence of the State Legislature, outside the protection given by Article 31-A.

The Inam Estates Act, as stated, received the assent of the President on the 11th day of December, 1963 and was first published in the *Fort St George Gazette* on the 1st of January, 1964 The provisions of the Act, *ex facie* fall under Entries 18 and 45 of the State List II of Schedule VII to the Constitution

" *Entry* 18 —Land that is to say rights in or over land, land-tenures, including the relation of landlord and tenant, and the collection of rents transfer and alienation of agricultural land, land improvement and agricultural loans , colonisation

Entry 45 —Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation or revenues "

As an Act for acquisition it falls under Entry 42 of the Concurrent List, List III of Schedule VII, which is :

" Acquisition and requisitioning of property. "

A Bill No. L of 1961 was originally introduced in the Legislative Assembly on the 29th September, 1961, and was referred to a Select Committee It took in only inam villages which became estates under the Madras Estates Land (Their Amendment) Act of 1936 The Select Committee was not able to make its recommendation before the Assembly was dissolved and accordingly the Bill lapsed It is the subsequent Bill No II of 1962, introduced on 27th April, 1962, that became the Act. After the Select Committee's report on the Bill ' new inam estates ' were also brought under the Act. In the counter-affidavit on behalf of the Government it is stated that the Bill had been discussed threadbare by the Joint Select Committee and when referring the Bill for the assent of the President specific attention was drawn to the provision of Article 31 of the Constitution The relevant papers relating to the securing assent of the President to the Bill including the original Bill were produced in Court and we find from the record that the entire Bill which ultimately became law had been reserved and submitted to the President was specifically drawn to the fact that assent was sought under Article 31-A of the Constitution In the reply affidavit in Writ Petition No 1457 it is averred thus on the question of the President's assent :

"At the time when the Bill was passed, it was made to appear that the compensation was being provided under the Act to the dispossessed landholder It is that assurance that must have enabled the obtaining of the assent of the President The obtaining of the assent in such a context cannot preclude this Honourable Court in examining whether the statute is not a fraud on the Constitution Neither the fact that the Bill was referred to a Joint Select Committee nor the fact that the attention of President was drawn to Article 31-A of the Constitution can render the statute valid which is otherwise a fraud on the Constitution "

We are unable to appreciate the import of these averments As already stated, it is the Bill that was ultimately passed by the Legislature with its provisions as to compensation which has since become law that was submitted to the President for his assent. Counsel for the petitioners does not contend that it is otherwise.

The relevant proviso to Article 31-A reads ·

"Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent "

The provision for assent in respect of State Bills is found in Articles 200 and 201 which run thus :

"*Article* 200 When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the house or houses shall reconsider the Bill accordingly and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom

Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill

Article 201 When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom

Provided that, where the Bill is not a money Bill, the President may direct the Governor to return the Bill to the House or as the case may be the Houses of the Legislature of the State together with such a message as is mentioned in the first Proviso to Article 200 and when a Bill is so returned the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and if it is again passed by the House or Houses with or without amendment it shall be presented again to the President for his consideration "

Article 31 (3) and Article 31-A provide for reservation of the law for the President's assent Article 31 (3) may also be set out ·

"No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President has received his assent."

It is not disputed that this Court has power to determine when challenged whether everything has been done which the law prescribes as necessary for the emergence of a valid statute. What is now said is, that constitutional rights of the subject have been infringed with reference to the statute by the failure in its format or, of a component part of the law making body Examining the question whether such an enquiry would necessarily lead to a breach of Parliamentary privilege, it is observed by A G Guest in Oxford Essays in Jurisprudence, 1961 at page 215

"Ever since the memorable judgment of Holt C J in *Ashby* v *White*[1], it has been settled that privilege is part of the common law and cannot affect rights to be exercised outside or independently of the house Regularity of internal proceedings is one thing, the constitutional rights of the subject are another and it is latter which are in issue in such a case "

Article 212 of the Constitution only precludes Courts from enquiring into the validity of any proceedings in the Legislature on the ground only of any alleged irregularity of procedure The contention of Counsel as we understand is that the impact of the Bill in its full force would have been obvious to the President from its language and that the possible repercussions of the Bill in regard to compensation and other features must have been brought specifically to the notice of the President Now apart from the terms of the Bill there could have been no assurance as to compensation and the Bill in its final form was before the President Learned Counsel said that as the provision of the Bill was confiscatory in character the assent should have been given. But the argument overlooks that the very purpose of reserving the Bill under Article 31-A for the President's assent is to cure its invalidity. It must be in the consciousness that the Bill would be attacked as void being in contravention of Articles 14, 19 and 31 that the Bill is submitted to the President for his assent under Article 31-A Assent under Article 31 (3) gives sanction for some limited inroads on property rights Assent under Article 31-A gives greater even practically full cover, Articles 14, 19 and 31 being taken out of the way This protective Article proceeds on the basis that the law may be void as inconsistent with or taking away or abridging the rights conferred under Articles 14, 19 and 31 The President, of course, is expected to consider the law and assent, and it has to be presumed that the President has done so The President may declare either that he assents to the Bill in which case the Bill becomes law or that he withholds assent therefrom in which case the Bill falls through, unless the procedure indicated in the proviso to Article 201 is followed It must be noticed that Article 31-A was first inserted by the Constitution (First Amendment) Act of 1951 and has undergone two amendments, first in 1955 under the Fourth Amendment and again in 1964 under the Seventeenth Amendment The amendments have purposely been given retrospective effect to save legislation effecting agrarian reforms The Article with its amendments has come into the Constitution to save such legislation from attacks on the ground of constitutional transgressions based on Articles 14, 19 and 31 The contention in the circumstances that the law being violative of the constitutional guarantees the President should not have given his assent is meaningless and unsound Equally the submission that as the law impinges Articles 14, 19 and 31 (2), it is a fraud on the Constitution, is devoid of substance Once the absence of legislative competency from violations of Articles 14, 19 and 31 (2) is cured by the President's assent, that Act cannot be challenged as a fraud on powers for transgression of rights guaranteed under those Articles.

It is submitted that in the camouflage of language and definition and pretentious provision for payment of compensation, the true effect of the Act, its evasion and invasion of the guaranteed rights have been kept masked and veiled from the President In our view this is a hopelessly puerile submission. Learned Counsel submits that the President has been constituted the sole Judge for deciding whether the State law should have effect. It is, therefore, incumbent it is stated, that while the Bill in form is not confiscatory but in reality the compensation provided for will be illusory, the Statement of Objects and Reasons accompanying the Bill and sent to the President must be complete and there must be full disclosure of the possible repercussions of the several provisions of the Bill We agree with learned Counsel that reservation of a Bill for consideration and assent by the President is not a

1. (1703) 14 St. Tr. 695.

mere matter of form. As we see it, it is an essential and important part of the machinery of law making set up by the Constitution Bearing in mind the practice that had been obtaining in Constitutions of the Colonies and Dominions of the British Commonwealth including the Constitution under the Government of India Act, 1935, we think it may be safely assumed that when a Bill is reserved by a Governor of a State for consideration of the President, the Bill will be examined by the Law Advisers of the President Under the Constitution as now amended, the Legislative power for acquisition and requisition of property has been brought into the Concurrent List and Article 44 of Part IV containing Directive Principles of State policy provided for securing for citizens a uniform civil code throughout the territory of India The President may be expected to consider any State Bill submitted to him from the angle of securing uniformity of legislation The President may be expected to examine with all the facilities at his disposal the effect and extent of transgression of the constitutional rights guaranteed, when protection is sought for such transgression. Learned Counsel points out that as laid down in *Vajravelu* v *Special Deputy Collector*[1], a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of, or specify the principles for the purpose of ascertaining the just equivalent of what the owner has been deprived of. Here is a right in a citizen to have the just equivalent of what he has been deprived of by State acquisition ; but the right is not justiciable when the question raised is as to the adequacy of compensation and the only safety is in the consideration of the law by the President. Now while a law under Article 31 (2) could be challenged where the compensation fixed is illusory or the principles prescribed are irrelevant to the value of the property at or about the time of the acquisition as a fraud on powers, even this limited scope for challenge is unavailable if the Act falls under Article 31-A. Hence, learned Counsel contends that a heavy responsibility rests on the President as the ultimate authority against wholly unjust and expropriatory laws in such cases.

In this connection elaborating the argument, learned Counsel drew our attention to certain passages in the classic treatise, Spenser Bower on Actionable Non-disclosure. We are unable to appreciate the relevancy of the principles found in these passags in the context of law making according to constitutional provisions. At page 517 of the treatise, in para. 581 it is stated :

"Whenever the Crown, or an officer or department of the State is induced by suppression, or perversion, of material facts within the actual or presumptive knowledge of the grantee, to confer any privilege on a subject, whereby the rights and interests of any other subject, or of the King's other subjects in general, are proportionately curtailed, such grant, on the proper proceedings being taken by the proper parties will be repealed, revoked, withdrawn or avoided, or (without being formally avoided) treated as void."

For one thing there has not been a plea in the present case of any suppression or perversion of material facts in securing the assent and we do not see any case made out, that information was deliberately withheld from the President when securing his assent ; nor was there anything to prevent the representatives of the inamholders submitting their case on the Bill to the President The President must be presumed to have fully acquainted himself with the whole scope of the Bill and its full implications Law has not prescribed any procedure to be observed before the President gives his assent to a bill reserved for his consideration And there is a presumption of regularity attached to all official business ; *omnia presumuntur rite et solemniter esse acta* In the same treatise on actionable non-disclosure at page 519 it is observed :

"The burden of proof on the party claiming relief is, *mutatis mutandis* substantially the same as that which rests on a party complaining of the non-disclosure to him of material facts in the course of a negotiation with a view to a contract or transaction *uberrimae fidei* That is to say, the Attorney-General, or the aggrieved subject, as the case may be, must allege and establish circumstances raising the duty of disclosure as between the grantee and the Crown, and must show that it was material for the Crown to be informed of the particular undisclosed fact Secondly, he must show if challenged the existence or occurrence, in point of fact, of that which he alleges to have been withheld from the

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1. (1964) 2 S C J 703 (1964) 2 M L J (S C) 173 (1964) 2 An W R. (S C) 173.

King's notice, fourthly it must be shown that the subject to whom the impeached grant was made had either actual or presumptive knowledge of the undisclosed fact. Lastly, it must be established that the King had no knowledge *aliunde* of the undisclosed fact."

There is nothing in the light of the said principles to suggest that the reservation of the Bill for the President's assent and the securing of the President's assent to the bill is in any manner vitiated, even assuming that Courts could go behind the assent once given by the President. But as pointed out by Mahajan, J. (as he then was), in *Raja Suriya Pal Singh* v. *The State of Uttar Pradesh*[1], it is the subjective opinion of the President that leads to the assent and it is not justiciable. The learned Judge observes:

"The difference is that persons whose properties fall within the definition of the expression 'estate' in Article 31-A are deprived of their remedy under Article 32 of the Constitution and the President has been constituted the sole Judge of deciding whether a State law acquiring estates under compulsory power has or has not complied with the provisions of Article 31 (2). The validity of the law in those cases depends on the subjective opinion of the President and is not justiciable. Once the assent is given, the law is taken to have complied with the provisions of Article 31 (2)."

In our view, though the broad principles on which the assent is intended to be given or withheld from a reserved Bill may be deducible, they are not specifically laid down in the Constitution. That being so, it will not be open to the Courts to question the propriety of the President's action. We may in this connection refer to section 13 (2) of the Government of India Act, 1935, whereby it is provided that the validity of anything done by the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him. Under the Constitution Act of 1935, it may be remembered, the Governor-General was bound by the Instrument of Instructions to withhold his assent from certain Bills, in certain cases.

We shall next take up the cognate contention that as a law which transgresses the fundamental rights must be deemed to be void from its inception; the President's assent cannot give it life and make it effective. It is argued that the Act in question is a post-Constitution Act which infringes guaranteed fundamental rights and is therefore a still-born law dead from the beginning. The contention is that the law under Article 31-A which is reserved for consideration of the President can only mean a valid law and there can be no valid law when it contravenes the provisions of the Constitution. In other words, it is said that the Act which is sent to the President is an unconstitutional Act and therefore not a law under Article 13 (2). This is arguing in a circle. The law is reserved for the President's assent to give it life, to make it valid and effective. Constitutionally it is yet to become a law. A Bill pending assent is in the legislative process of becoming law. The question of voidness can arise only in relation to a law and not to a Bill. If the contention put forward is accepted, it will render Article 31-A nugatory. A reading of Articles 31 and 31-A shows that in the context, the word 'law' in the first proviso to Article 31-A cannot be understood in its strict sense. Article 31-A assumes that the legislation in question is open to attack under Articles 14, 19 or 31. The very language "no law ... shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31" assumes that the law may be void but for the non-obstante provision. In our view, the word 'law' appears to have been used in a compendious way describing also a legislation that has been passed through the Legislature of a State and not yet received the assent of the President. In Part VI of the Constitution where the legislative procedure is given, there is no provision for reservation of a law for the President's consideration. Articles 200 and 201 speak only of a Bill. In our view the word 'law' used in Article 31-A means just a Bill passed by the Legislature of a State. Similar arguments had been attempted with reference to Article 31 (3) in the *State of Bihar* v. *Kameshwar Singh*[2], the (*Darbanga Case*),[2] where Patanjali Sastri, C.J. observes:

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1. (1952) S.C.J. 354 : (1952) S.C.J. 427 : (1952) S.C.J. 446 : (1952) S.C.R. 1056, 1068.

2. (1952) S.C.J. 354 : (1952) S.C.J. 427 : (1952) S.C.J. 446 : (1952) S.C.R. 889 at 908.

"The Constitution would thus seem to contemplate only Bills passed by the House or Houses of Legislature being reserved for the consideration of the President and not laws to which the Governor has already given his assent. Nor is the phrase 'law so assented to' strictly accurate, as the previous portion of the clause makes it clear that what is reserved for the President's assent and what he assents to is a Bill and not a law. The phrase obviously refers to what has become a law after receiving the assent of the President. Similarly, Article 31 (3) must, in my judgment, be understood as having reference to what, in historical sequence, having been passed by the House or Houses of the State Legislature and reserved by the Governor for the consideration of the President and assented to by the latter, has thus become a law."

In *Visveshwar Rao* v. *The State of Madhya Pradesh*[1], Das, J. (as he then was) with reference to Article 31 (3) observes:

"The whole argument is built on the word 'law'. I do not think that what is referred to as law in Article 31 (3) is necessarily what had already become a law before receiving the assent of the President. If that were the meaning, the clause would have said unless such law, having been reserved for the consideration of the President, receives his assent. The words 'has received his assent' clearly imply and point to an accomplished fact that the clause read as a whole does not grammatically exclude a law that eventually became a law by having received the assent of the President. The question whether the requirements of Article 31 (3) have been complied with will arise only when the State purports to acquire the property of any person under a law and that person denies that the asserted law has any effect. It is at that point of time that the Court has to ask itself . . . . 'Is it a law which, having been reserved for the consideration of the President, has received his assent ?'. I think it is in this sense that the word 'law' has been used. In other words, the word 'law' has been used to mean what at the time of dispute purports to be or is asserted to be a law."

These observations would apply with equal force to the word 'law' in Article 31-A.

We shall now proceed to the consideration of the submission that the inams which the impugned Act seeks to cover are not estates whose acquisition is protected under Article 31-A of the Constitution. The impugned Act acquires, for the purpose of completing the agrarian reforms that the Government has in view, inam estates as defined in the Act. Inam estates are either existing inam estates or new inam estates. The definition of these inam estates has already been set out. Article 31-A, clause (2), as it now stands amended by the Constitution (Seventeenth Amendment) Act, 1964 with retrospective effect, defines an estate thus :

"(*a*) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala, any *janmam* right ;

(ii) any land held under ryotwari settlement ;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans."

If the property, the subject of acquisition under the impugned Act, falls within the definition of estate under Article 31-A (2) as above set out, the validity of the Act cannot be impugned on the ground that it contravenes Articles 14, 19 and 31. The question, therefore, for consideration is whether the inams defined under the Inam Estates Act fall under the expression 'estate' in Article 31-A (2) (*a*). Where the property sought to be covered by the Act is in the terminology of the existing law relating to land tenures in force in the State described as estate, there can be no difficulty. Existing law is defined under Article 366 (10) as meaning any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or a person having power to make such a law, ordinance, order, bye-law, rule or regulation. Difficulties can arise only where the relevant local law does not describe any particular agricultural property as estate. It is not of course disputed that even though no

1. (1952) S.C.J. 427 at 443.

agricultural property is expressly or specifically described as an estate in a local law, there may be agricultural properties in the area which will constitute an estate under clause (2) (*a*). In such cases, it will become necessary to examine its attributes and essential features and enquire whether it satisfies the tests for an estate under clause (2) (*a*) Of the two tenures which fall under the concept inam estate in the impugned Act, *prima facie* there can be no difficulty in holding that the existing inam estate is an estate under Article 31-A The very definition of existing inam estate conveys that it is an estate under the existing law It is a whole inam village which was brought under the Estates Land Act under section 3 (2) (*d*) of the said Act by the Madras Estates Land (Third Amendment) Act XVIII of 1936 These estates were excluded from the estates taken over under the Madras Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948 These estates are otherwise known as Iruwaram Inam Estates

On behalf of the owners of these iruwaram estates, the contention now made is that the Third Amendment Act of 1936 itself is not a valid law and was beyond the competence of the Provincial Legislature It is contended that it contravened section 299 (2) of the Government of India Act of 1935 in not providing the just equivalent of what the proprietor was deprived of by bringing in the inams under the Estates Land Act It may be stated that when legislation to bring the iruwaram inams under the provisions of the Estates Land Act was on the anvil in 1934 there was considerable agitation by these inamdars The Governor-General in the first instance withheld his assent to the Bill and learned Counsel drew out attention to the following statement of the Governor-General for withholding his assent to the Bill.

" In accordance with the provisions of sub-section (4) of section 81 of the Government of India Act (1919) I hereby signify to you that my reason for with holding my assent from the Madras Estate Land (Second Amendment) Act, 1934, is that after the most anxious consideration, in the course of which representations submitted in support of the Act, have received no less attention than representation submitted in opposition thereto I have reached the conclusion that the Act is expropriatory in that it involves the loss of kudiwaram lands included in their inams by those inamdars who under the existing law would be in a position to establish their ownership of the kudiwaram and that a measure producing this result with no provision for the compensation of persons adversely affected should not be allowed to become law I desire at the same time to make it abundantly plain that this conclusion is in no way based on opposition and implies no opposition, to the proposition that the tenants of inamdars should be placed in a position enabling them to acquire occupancy rights and that I have been constrained to withhold my assent from the present measure by reason only of the fact that it fails to provide equitable compensation for the inamdars whose rights are affected thereby. "

We may in passing observe that learned Counsel sought to press home his contention just now considered the question of the President's assent by referring to the regard the Governor-General has shown in the matter of the amendment. But they were spacious days of the laissez-faire doctrine, when the alien Government did not mind being very solicitous of property rights, may be in the view that they contributed to the stability of the Empire. The then Madras Government subsequently sought and obtained sanction for a Bill with provisions for some compensation, by the addition of clauses providing that if an inamdar proved that he had kudiwaran right in the land which did not come within the definition of private lands, the tenant of such land could acquire occupancy rights on payment of compensation to the inamdar The quantum of compensation which ultimately came to be provided when the Bill became law was an amount equivalent to the annual rent payable in respect of the land together with costs of preparing any instrument required to confer occupancy right. It is the case of the petitioners that this compensation was wholly inadequate and nominal and the legislation was confiscatory in character, but that no action was taken by the inamdar immediately, as comprehensive tenancy legislation was awaited In the report of the Estates Land Act Committee, Part I (Prakasam Committee, 1937) in their conclusion it is remarked with reference to the quantum of compensation that had been provided to the inamdars under Act XVIII of 1936 that it was like granting one pie nominal damages in an action for tort The Committee observed that if Courts declared that the kudiwaram right was in the inamdar he must be given

a reasonable compensation for parting with such rights and that he will be entitled to compensation on the same basis in which a vendor or owner would be entitled to get in return for parting with his rights, from a purchaser. Learned Counsel relied on section 299 of the Government of India Act which in express terms said that the Legislature had no power to make any law authorising compulsory acquisition for public purpose of any land unless the law provided for the payment of compensation for the property acquired Reference is made to the decision of the Supreme Court in *Jeejeebhoy* v. *Assistant Collector, Thana*[1], where it has been held that it cannot be said that the expression 'compensation' in section 299 of the Government of India Act, 1935, should be given a meaning more restricted than that given to the said expression in Article 31 (2) of the Constitution. The expression 'compensation' in section 299 of the Government of India Act will also mean a just equivalent of what the owner has been deprived of. But this contention elaborately developed has to fall to the ground for the simple reason that the Government of India Act, 1935, became effective only from 1st April, 1937, and the Third Amendment Act had long prior to that date became law

There is another formidable obstacle in the way of the petitioners relying on section 299 of the Government of India Act. Under the Third Amendment Act there is no question of any compulsory acquisition of property for public purpose to take in the obligation of providing for payment of compensation The Third Amendment Act is one intended to regulate the relation between the landlord and tenant and diminish the rights till then enjoyed by the landlord in connection with his land. In this view, the fact that further amendment of section 3 (2) (*d*) of the Estates Land Act was deemed necessary to bring in all iruwaram inam villages and the necessary amendment was made only in 1945 by the Madras Estates Land (Amendment) Act II of 1945 is not of any consequence. It follows that an existing inam estate would fall under the expression 'estate' in Article 31-A (2) (1) of the Constitution and legislation in respect of the same could claim protection under the first proviso to Article 31-A (1).

The next question for consideration will be whether the property falling under the definition of new inam estate under the impugned Inam Estates Abolition Act would be covered by the expression 'estate' under the Constitution. A new inam estate as per the definition includes a part village inam estate which in fact is a minor inam, and what is referred to as a Pudukottai Inam estate. The contention that these inams are not estates under Article 31-A, applies also to minor inams, the subject of legislation under the impugned Act XXX of 1963. Briefly put the argument runs thus. Once there is a definition of the expression 'estate' in any existing local law relating to land tenure, Article 31-A would apply only to such estates, and by a mere post-Constitution definition a property which was not an estate previously cannot be brought under the expression 'estate'. Minor inams were never deemed to be estates. Though the scope of the expression 'estate' in Article 31-A has by the Seventeenth Amendment been considerably widened, the two impugned Acts proceed only on the basis that all inams are also estates under Article 31-A. Under the Constitution First Amendment whereby Article 31-A was added to the Constitution, 'estate' was defined thus.

> "The expression 'estate' shall in relation to any local area have the same meaning as the expression 'or its local equivalent' has in the existing law relating to land tenures in force in that area, and shall also include any *jagir, inam* or *mauft* or other similar grants "

The Fourth Amendment to the Constitution added at the end of the definition " and in the States of Madras and Kerala any *Jenmam* rights." Now the scope of the expression 'estate' has further been widened by the Seventeenth Amendment, as set out before. Learned Counsel for the petitioners contends that the word 'inam' found in clause (2) (*a*) (i) of Article 31-A as it now stands should be construed in *ejusdem generis* sense as to include only an inam that was an estate on the date of the Constitution. It is submitted that only those inams which under the existing law were estates would be covered by the expression 'estate' under clause (2) (*a*)

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1. A I.R 1965 S.C. 1096.

that is to say, inams which became estates under the Third Amendment to the Madras Estates Land Act could alone be considered to be estates for Article 31-A. The argument is that the original intention in the introduction of Article 31-A was to cover only cases of Zamindars and other intermediaries who stood between the State and cultivators and who were generally alienees of land revenue. It is urged that it is only what may be broadly described as landlord tenures that fall within the scope of the expression 'estate'. According to learned Counsel where there is an existing law in which the word 'estate' as such is defined, the word should have that meaning and the expressions following in Article 31-A (2) like *jagir*, *inam* and *muafi* are just illustrative of the kinds of estates that could come under the central concept of the word 'estate' so defined. But as we see it, neither by the language of Article 31-A nor by the setting of the relevant expressions are we compelled to adopt the narrow construction suggested for the petitioners. The scope of the expression has been deliberately expanded by the two Amendments and the inclusion of *jagir*, *inam* and *muafi* is preceded by the phrase "and shall also include". The significance of this phrase, in our view, is that otherwise these tenures would not be estates. The use of the word 'also' must have its proper import. The word 'any' before *jagir*, *inam* and *muafi* is significant. When the expression is 'any' inam, we cannot limit inams to any particular category, to inams which were estates under the local law prior to the 26th of January, 1950 only. There is no restriction on the content of the word 'inam' as to require it to satisfy the definition of estate in the local area. In *Dilworth* v *Commissioner of Stamps*[1], Lord Watson stated:

"'Include' is very generally used in interpretation clauses to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used those words and phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include."

If the connecting word used had been only 'inclusive' and not the expression 'and also include', a contention is plausible that the word has been used in the restrictive sense. Occasionally no doubt in some instances the word 'include' may be used as illustrative of what has been said before. But in the context of the present user, it is clear that the word has been used in an expansive sense. We do not think it necessary to labour further on this contention, as the question is concluded by the decision of the Supreme Court in *Mahant Sankarshan Ramanuja Das Goswami* v *The State of Orissa*[2], which, we find, confirms the decision of the Orissa High Court in *Sankarsana Ramanuja* v. *Orissa State*[3]. The Orissa High Court rejected a contention similar to the one now put forward before us seeking to confine the word 'inam' in Article 31-A (2) (*a*) to whole inam villages which were estates under the Madras Estates Land Act and as not including minor inams The inams in question which came up for consideration before the Orissa High Court were grants of lands which comprised both melwaram and kudivaram rights and were just minor inams. Upholding the decision of the Orissa High Court, Hidayatullah, J., speaking for the Court observed:

"Learned Counsel for the appellants also urged, though somewhat faintly, that the *ejusdem generis* rule should be applied to the definition of 'estate' in Article 31-A (2) (*a*) as also the corresponding new definition in the Abolition Act. This argument proceeds upon an assumption for which there is no foundation. The *ejusdem generis* rule is applicable where wide or general term has to be cut down with reference to the genus of the particular terms which precede the general words This rule has hardly any application where certain specific categories are 'included' in the definition. The *ejusdem generis* may be applicable to the general words 'other similar grant' which would take their colour from the particular categories, '*jagir, inam* and *muafi*', which precede them, but the word 'inam' is not subject to the same rule Once it is held that inams of *any kind* were included, it makes little difference if the inams were of lands and not of whole villages. So also the fact that the holders of such inams cannot be described as intermediaries, or that they comprised both the *melwaram* and the *kudiwaram* rights"

In view of this decision of the Supreme Court before us, the contention is not even open to the petitioners that Article 31-A will not apply to the inams which are the subject of the impugned Acts, Madras Acts XXVI and XXX of 1963.

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1. L R. (1899) A.C 99 at 105, 106.
2. (1962) 3 S C.R 250 to 258.
3. A.I.R. 1957 Orissa 96.

We shall next take up for consideration the final ground of attack to dislodge the Inam Estates Act from its position of vantage under the cover provided by Article 31-A By the proviso to Article 31-A (1) once the Bill has been reserved for consideration of the President and his assent secured, the law gets protection from being assailed for transgressions of Articles 14, 19 and 31 of the Constitution But Article 31-A of the Constitution cannot stand in the way of judicial scrutiny on the competency of the Legislature over the subject of legislation. The contention that requires examination, is that the field of legislation under Entry 42 of List III providing for compensation is conditioned from the very connotation of the word 'acquisition', that the law providing for acquisition should also provide for compensation, and compensation, has been declared by the Supreme Court, to mean the just equivalent of what the owner is deprived of The argument is that by history and legislative practice the word 'acquisition' has a special meaning and has always been understood as acquisition subject to payment of just compensation: the power of acquisition can be exercised only subject to the payment of proper compensation Acquisition and compensation in its true scope go together and are inseparable so much so that there could be no law for acquisition without provision for compensation The provision for compensation under Article 31 (2), it is stated, only gives a further safeguard lifting the requirement to the status of a fundamental right. Learned Counsel submits that it is a double safeguard and the non-availability of one, namely, compensation as a fundamental right, will not preclude agitation for fair compensation as an inherent and well understood concomitant of any acquisition We are constrained to say that this argument is wholly devoid of substance and we mean no disparagement to learned Counsel for the petitioners to whom we are indebted for interesting arguments on several questions that arose for consideration in these cases, when we say that this is the weakest and most fragile argument that could be laid hold of, similar arguments having been attempted and turned down in the Supreme Court in cases impugning Zamindari Abolition Acts The only excuse which we can see for resurrecting this argument before us without reference to the prior decisions is that the inamdars find themselves *in extremis* and hope to find some foothold in the bastion from some of the amendments that have since been made to the Constitution.

Now let us examine this position Prior to the Seventh Amendment of the Constitution in 1956, that is, prior to 1st November, 1956, the legislative power relating to acquisition and requisitioning was divided between the Union and States Acquisition for the purpose of the Union was Entry 33 in List I, Seventh Schedule

"Acquisition or requisitioning of property for the purpose of the Union "

The State's power was found in Entry 36 of List II :

" Acquisition or requisitioning of property except for the purpose of the Union, subject to the provisions of Entry 42 of List III. "

The power in matters relating to compensation was found in the Concurrent List :

" *Entry* 42'. Principles on which compensation for property acquired or requisitioned for the purpose of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given. "

By the Seventh Amendment, Entry 33 in List I and Entry 36 in List II were dropped and for the original Entry 42 in List III was substituted as Entry 42·

" Acquisition and requisitioning of property. "

The provision relating to the principles on which and the manner in which compensation for property acquired or requisitioned is to be determined and given is now found only in Article 31 (2) Article 31 (2) since the Fourth Amendment in 1955 reads.

" No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which the compensation is to be determined and given ; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate. "

Article 31 (2) before its amendment in 1955 ran thus.

"No property, moveable or immoveable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which and the manner in which, the compensation is to be determined and given."

Prior to the amendment of clause (2) by the Fourth Amendment, the language of the clause was not quite clear only in respect of public purposes and it seemed that only by implication one could infer from the principles of "eminent domain" that the existence of public purpose was a condition precedent to compulsory acquisition of property and that accordingly the question as to the existence of public purpose was justiciable notwithstanding Articles 31 (4) and 31-A. There was strong cleavage of judicial opinion as will be seen in the *Darbhanga case*[1], three of the learned Judges Patanjali Sastri, C.J., and Mukerjee and Das, JJ., holding that the existence of a public purpose as a pre-requisite to the exercise of the power of compulsory acquisition is an essential and integral part of the provisions of Article 31 (2) and an infringement of such a provision cannot be put forward as a ground for questioning the validity of an Act providing for compulsory acquisition, while the other two learned Judges Mahajan, J., (as he then was) and Chandrasekhara Iyer, J., held that the scope of Article 31 (4) is limited to the express provisions of Article 31 (2) and though the Courts cannot examine the extent or adequacy of the provisions of the compensation contained in any law dealing with the acquisition of property compulsorily, yet the provisions of Article 31 (4) do not in any way debar the Court from considering whether the acquisition is for a public purpose. By the amendment introducing the word 'save for a public purpose', public purpose has been made an express condition for compulsory acquisition or requisitioning, and further clauses (1) and (2) of Article 31 have been made mutually exclusive, clause (2) besides being attracted only when there is compulsory acquisition or requisitioning. We fail to see how these amendments to the Constitution provide any room for arguments for the petitioners. Far from it they point the other way. In fact, we heard nothing tangible. The provisions as to payment of compensation is an essential requisite even originally under Article 31 (2) and it was never in doubt that the relevant legislative entries by themselves did not make provision for compensation a valid requirement of legislative competence. Compensation having been provided for under Article 31 (2), it cannot at the same time be regarded as inherent and involved as a matter of common law in the legislative entry providing for acquisition—*expressum facit cessare tacitum*. In the *Dharbanga case*[1], Patanjali Sastri, C.J., remarks at page 904,

"It is true that under the common law of eminent domain as recognised in the jurisprudence of all civilised countries the State cannot take the property of its subject unless such property is required for a public purpose."

Proceeding the learned Chief Justice observes at page 906:

"The fact is that the law-making power of both Parliament and State Legislatures can be exercised only subject to the aforesaid two restrictions, not by reason of anything contained in the entries themselves but by reason of the positive provisions of Article 31 (2) and, as laws falling under Article 31 (4) or under Articles 31-A and 31-B cannot be called in question in a Court of law for non-compliance with these provisions, such laws cannot be struck down as unconstitutional and void."

At page 929, Mahajan, J. (as he then was) who differed as regards 'public purpose', stated:

"The question for consideration is whether this obligation to pay compensation for compulsory acquisition of property has been impliedly laid down by the Constitution-makers in our Constitution under legislative head in Entry 36 of List II and Entry 33 of List I, or whether this all important obligation which follows compulsory acquisition as a shadow has been put in express and clear terms somewhere else in the Constitution. To my mind, our Constitution has raised this obligation to pay compensation for the compulsory acquisition of property to the status of a fundamental right and it has declared that a law that does not make provision for payment of compensation shall be void. It did

1. (1952) S.C.J. 354: (1952) S.C.J. 427: (1952) S.C.J. 446: (1952) S.C.R. 889.

not leave the matter to be discovered and spelt out by learned arguments at the Bar from out of the contents of Entry 36, they explicitly provided for it in Article 31 (2) of the Constitution As the obligation to pay has been made a compulsory part of a statute that purports to legislate under Entry 33 of List I and Entry 36 of List II, it is not possible to accede to the contention of Mr P R Das that the duty to pay compensation is a thing inherent in the language of Entry 36 I agree with the learned Attorney-General that the concept of acquisition and that of compensation are two different notions having their origin in different sourses One is founded on the sovereign power of the State to take, the other is based on the natural right of the person who is deprived of property to be compensated for his loss One is the power to take, the other, is the condition for the exercise of that power Power to take was mentioned in Entry 36, while the condition for the exercise of that power was embodied in Article 31 (2) and there was no duty to pay compensation implicit in the content of the entry itself"

The learned Judge rejected the attempt to link up Entry 36 in List II with Entry 42 in the Concurrent List as based on an unsound contention Das, J, at page 979 stated:

"In my judgment, for the reasons stated above, the major premise in the arguments advanced by Mr P R Das under the first head, namely, that the obligation to pay compensation is implicit in Entry 36 in List II by itself or read with Entry 42 in List III is unsound The obligation to provide for compensation being as I hold, a provision of Article 31 (2) and not being implicit in or a part and parcel of the legislative power itself under Entry 36 in List II read by itself or in conjunction with Entry 42 in List III, the impugned Act cannot, by virtue of Articles 31 (4), 31-A and 31-B be called in question on the ground that it contravenes or is inconsistent with or takes away or abridges any of the rights conferred by the provisions of clause (2) of Article 31, that is to say, that it does not provide for compensation"

The aforesaid decision is clear and binding authority for the position that the obligation to pay compensation for property acquired by the State is not an obligation imposed by Entry 36 of List II read by itself or in conjunction with Entry 42 of List III. There is nothing in the Fourth Amendment that could in the least affect the decision, and by the Seventh Amendment all scope for such arguments, is removed It is surprising that in spite of these explicit and weighty pronouncements, if we may say so with respect, as to the content of the legislative lists the matter should have been resurrected once again. The effect of the Fourth Amendment, if at all, has been to make the requirement as to public purpose explicit or express in Article 31 (2). That the effect of the Fourth Amendment is to make clauses (1) and (2) of Article 31 mutually exclusive, does not affect the proposition now under consideration. The following observation of the Supreme Court in *State of Bihar* v. *Rameshwar Pratap*[1], on the effect of the Fourth Amendment is significant in the context of the present contention:

"The question whether the validity of a law for compulsory acquisition of property by the State can be challenged on the ground that the 'acquisition' is not for a public purpose had to be considered by this Court even before the amendment of Article 31 (2) as mentioned above in *State of Bihar* v. *Sir Kameshwar Singh*[2] Article 31 (2) as it then stood did not in so many words provide that no acquisition can be made save for a public purpose, but it was argued on behalf of the State that such a provision was implicit in the words of Article 31 (2) This argument was rejected by Mahajan and Chandrasekhara Aiyar, JJ, but it was accepted by Patanjali Sastri, C J, and Das, J, both of whom held that the requirement of public purpose being a condition for compulsory acquisition laid down by Article 31 (2), the law was saved in spite of the violation of such condition by Article 31 (4) and also Article 31-A Mukherjee, J, also said that the requirement of public purpose was a condition implied in the provisions of Article 31 (2) His Lordship then added:

'For my part I would be prepared to assume that clause (4) of Article 31 relates to everything that is provided for in clause (2) either in express terms or impliedly and consequently the question of the existence of a public purpose does not come within the purview of an inquiry in the present case. It was in this State of Judicial opinion that Article 31 (2) was amended by the Constitution (Fourth Amendment) Act as mentioned above and the requirement of public purpose was expressly made a condition for compulsory acquisition by the State The basis for the argument that the question whether there was a public purpose or not is open to judicial review in spite of Article 31-A has therefore disappeared

It is worth noticing in this connection that in *Sir Kameshwar Singh's case*[2], the argument that quite apart from anything in Article 31 (2) as it then stood no law of acquisition could be made except for a public purpose was sought to be reinforced by the words in Item 36 of the State List and Item 42 of the Concurrent List . . . .

'The argument on the basis of these entries was that the State Legislatures had no power to make a law for acquisition of property without fulfilling the condition of public purpose The Constitution (Seventh Amendment) Act which came into force on 1st day of November, 1956 deleted Entry 36 of the State List and substituted for the former phraseology in Item 42 of the Concurrent List the words

1 (1963) 1 S C J 415 I L R 40 Pat 996 A I R 1961 S C 1649 at 1652

2 (1952) S C J 354 (1952) S C J 427: (1952) S.C J 446 (1952) S.C.R 889

' acquisition and requisition of property ' It is quite clear that after its amendment the legislative list permits the State Legislature to enact a law of acquisition even without a public purpose , and that the only obstacle to such a law being enacted without a public purpose is the provisions of Article 31 (2) That obstacle also disappears if the law in question is one within Article 31-A "

The effect of the Fourth Amendment is to bring in the requirement as to public purpose in line with the requirement as to compensation Since the Fourth Amendment, the only obstacle to a law of acquisition being enacted without a public purpose or compensation, is Article 31 (2) In the words of Das Gupta, J , in the above case even that obstacle disappears if the law in question is within Article 31-A

Reference was made by learned Counsel to *Attorney-General* v. *De Keyser's Royal Hotel, Ltd* [1], and *Central Control Board* v *Gannon Brewery*[2], for his contention that there could be no acquisition without providing for just compensation and that the distinction between acquisition and confiscation is that for the latter there is no compensation and when power is conferred for acquisition, it implies that the law providing for acquisition should provide for compensation We find little support in them for these propositions which have to be considered under the provisions of our Constitution These decisions do not go against the rule, a rule as much of logic as of commonsense, that when specific provision has been made in respect of compensation the implied power if any should be held to have disappeared In *Attorney-General* v. *De Keyser's Royal Hostel, Ltd* [1], relied on by learned Counsel, Lord Atkinson observed

" I should prefer to say that when such a statute, expressed the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal prerogative while it is in force to this extent ; that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance Whichever mode of expression be used, the result intended to be indicated is, I think, the same, namley, that after the statute has been passed and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal prerogative may theretofore have been "

In Legislative, Executive and Judicial Powers in Australia by W Anstey Wynes, 3rd Edition, it is stated at page 454

"The express grant in Par. (xxxi)—(under the Australian Constitution under Par (xxxi) of section 51 is found the Legislative power of Parliament with respect to acquisition of property on just terms) —both widens and limits the conditions of exercise of the power which would otherwise come within the incidental power—enlarges it to cover cases of direct acquisition simpliciter without the necessity of mere acquisition as part of a scheme, and limits the conditions of exercise to taking 'on just terms.' .... If the property is taken without compensation the question which arises is a political one merely, since a statute is equally good whether it confiscates, or merely compulsorily purchases; such is the position in England and the right flows from the sovereignty of Parliament and does not depend for its defence upon the doctrine called ' eminent domain '. The learned Justice (Barton, J.) questioned whether the Commonwealth had a right of ' eminent domain ' in addition to the legislative power granted by the Constitution. It is submitted that the Commonwealth has no such power in view of the grant contained in section 51 (xxxi) : *expressio unius exclusio alterius.* "

It may be relevant also in this connection to refer to the corresponding provisions in the Government of India Act, 1935 While the guarantee for payment of compensation was found under the Constitution of 1935 in section 299, clause (2) in terms similar to Article 31 (2), the legislative power was found in Entry 9 of List II which spoke merely of ' compulsory acquisition of land'. Referring to the scope of the entry in *Zamindar of Ettayapuram* v *State of Madras*[3], it is observed by the Supreme Court:

" . . . . . there was no entry in any of the lists attached to the Act of 1935 corresponding to Entry 42 in List III of the Indian Constitution. The only entry relevant to this point in the Act of 1935, was Entry 9 of List II which spoke merely of ' compulsory acquisition of land ' ; and it is clear that a duty to pay compensation or of laying down any principle regarding it was not inherent, in the language of the entry The guarantee for payment of compensation, so far as the Constitution Act of 1935, is concerned, was contained in section 299 clause (2) .. .. "

1. L R. (1920) A C 508.
2. L.R. (1919) A.C. 744.
3. (1954) S.C.J. 282 : (1954) 1 M L.J. 486: (1954) S C.R. 761 . A.I.R. 1954 S.C 257 to 259.

We have, therefore, no hesitancy in rejecting the contention that provision for compensation is inherent in Entry 42 of List III, and could affect, the exercise of legislative powers under the entry The obligation to provide compensation as in the case of public purpose since the Fourth Amendment is found only in Article 31 (2), and when an Act in shielded from that Article, it is immune from all attacks based on the requirements as to compensation, even if the compensation provided is illusory or no compensation is provided. It follows that the Madras Act XXVI of 1963 in general is not void for lack of legislative competency and there is no room for assailing the Act with the picturesque and epigrammatic expressions that the enactment is a " fraud on the Constitution " or a " fraud on power."

The other two Acts, the Leaseholds Act (XXVII of 1963) and the Minor Inams Act (XXX of 1963) are not much different in form, effect or content and the above conclusion of ours apply to them as well The Leaseholds Act seeks to abolish the intermediaries, namely, the lessees of leasehold villages It is stated that there are about 11 leasehold villages in the State, two of them leased for 99 years and nine others leased permanently Writ Petitions Nos. 1812 of 1965 and 1958 of 1965 are about the two villages under the 99 years lease which we are considering separately on their merits The provisions of the Act follow *mutatis mutandis* the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) except in regard to compensation, while the basis for calculating the basic annual sum adopted under the Estates Abolition Act has generally been followed, the amount of compensation is arrived at differently. In the case of leases granted in perpetuity the compensation is 10 times the basic annual sum and in other cases it is five times the basic annual sum. This Act received the assent of the President on the 12th of December, 1963 and was first published in the *Fort St. George Gazette* on the 1st January, 1964, the Act to come into force on such date as the Government may by notification appoint.

There was no serious argument before us that leasehold villages will not come under the expression " estate " in Article 31-A of the Constitution as it now stands since the Seventeenth Amendment Under Article 31-A (2) (*a*) (*iii*) any lands held or let for purposes of agriculture or for purposes ancillary thereto including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans is included in the expression 'estate'. The legislation in question (Act XXVII of 1963) is, therefore, legislation relating to acquisition by the State of estate or rights therein or extinguishment or modification of any such rights therein The Minor Inams Act (Madras Act XXX of 1963) received the assent of the President on the 28th of January, 1964 and was first published in the *Fort St. George Gazette* on the 5th of February, 1964. This Act is for the introduction of ryotwari settlement in minor inams, that is, inam grants of isolated fields or blocks left out of the Inam Estates Act of 1963. Except as regards the provision for compensation this Act also *mutatis mutandis* follows the Estates Abolition Act (Madras Act XXVI of 1948). In the case of inams granted to an individual without any condition of rendering service to any institution, the compensation is provided only for the loss of income from all sources in the inam excluding the land in respect of which any person is entitled to ryotwari patta under section 8 of the Act. Section 20 deals with payment of tasdik allowance to religious, educational and charitable institutions and section 21 deals with service inams In the case of inam granted to an institution or to an individual on condition of rendering service to any institution there is provision for giving an annual tasdik allowance to compensate for the loss of miscellaneous revenue derived from the inam if any at a sum equal to the average net annual miscellaneous revenue Under section 8 of the Act every person who is lawfully entitled to the kudiwaram in an inam land immediately before the appointed day, whether such person is an inamdar or not, is as and from the appointed day entitled to ryotwari patta in respect of the land A distinction is made in the cases of lands granted as iruwaram minor inam for the support or maintenance of religious institutions or for the purpose of charity or service connected with the religious institutions or

other religious charities. In the view we are taking it is unnecessary to go into greater details.

We shall now take up the contention that at any rate the sections in the three impugned Acts providing for a tenant securing extinguishment and discharge of arrears of rent at his option by depositing a fraction of the rent in arrears even in cases where the arrears have merged in decrees, are void as lacking legislative competency and violative of constitutional guarantees. The provision assailed is found in section 56 of Madras Act XXVI of 1963 (Inam Estates Abolition Act), section 43 of Madras Act XXVII of 1963 (Leasehold Estates Abolition Act) and section 41 of Madras Act XXX of 1963 (Minor Inams Abolition Act) It may be remembered that the Inam Estates Abolition Act covers not only the whole inam village grants which were made estates under Madras Act XVIII of 1936 and what are called *Explanation* estates, that is, estates which were deemed to be covered by the 1936 Amendment by the 1945 amendment of the Estates Land Act, but also part village inams and Pudukkottai inams The 'existing inam estates' had been subjected to rent reduction under the Madras Estates Land (Reduction of Rent) Act, 1947 (XXX of 1947). The impugned provision in the Inam Estates Abolition Act is the second proviso to section 56 (1) in respect of 'existing inam estates' which runs thus :

"Provided further that where the ryot—

(*a*) has paid before the notified date or pays within two years of that date, or

(*b*) where the rate of rent for the land has not been fixed under the Madras Estates Land (Reduction of Rent) Act, 1947 (Madras Act XXX of 1947) before the notified date pays within two years of the date on which such rates of rent are fixed under this Act, the rent due for the fasli years 1356 and 1357 and any interest payable thereon together with any costs which may have been decreed then, all arrears of rent due from such ryot in respect of all prior fasli years, including interest and costs, if any, shall be deemed to have been completely discharged,

Explanation.—Any amount collected by the Government on behalf of the landholder as rent from the ryots in excess of the rent determined under the Madras Estates Land (Reduction of Rent) Act, 1947 (Madras Act XXX of 1947) and paid to the landholder shall, for the purposes of this sub-section, be deemed to be an amount collected by the landholder."

Section 56 (3) provides for discharge of arrears of rent in certain cases in regard to 'new inam estates', that is, Pudukottai inams and part village inam estates, and is given effect at once. Section 56 (3) reads:

"(*i*) Notwithstanding anything contained in this Act, in the case of a new inam estate, all arrears of rent payable by a ryot to a landholder in respect of any land in such estate and outstanding on the date of publication of this Act in *Fort St George Gazette* shall, to the extent to which such arrears are in excess of the rent due for three fasli years in respect of that land, be deemed to be discharged whether or not a decree has been obtained therefor, if the ryot pays to the landholder the arrears of rent due for a period of any three fasli years,

(*ii*) In any suit or proceeding for the recovery of any arrears of rent referred to in clause (*i*), the Court or authority concerned shall, upon deposit in the Court or before the authority, or upon proof by the ryot of the payment, of arrears of such rent for three fasli years, dismiss the suit or proceeding;

(*iii*) If before the date of publication of this Act in the *Fort St. George Gazette* any decree or order has been passed in any suit or proceeding for the recovery of any arrears of rent due from a ryot, which is inconsistent with the provisions of this sub-section, the Court or authority concerned shall upon deposit in the Court or before the authority or upon proof of the payment, of the arrears of rent due from the ryot for three fasli years and on the application of any person affected by such decree or order, whether or not he was a party thereto, vacate the decree or order :

Provided that nothing contained in this sub-section shall apply to any suit or proceeding in which the decree or order has been satisfied in full, before the date of publication of this Act in the *Fort St. George Gazette*,

(*iv*) ....

Explanation.—For the removal of doubts it is hereby declared that the payment or deposit, of arrears of rent for three fasli years referred to in this sub-section shall be payment or deposit made after the date of publication of the Act in the *Fort St George Gazette*"

The corresponding provision extinguishing arrears under the Minor Inams Act, section 41, runs thus .—

"(1) Notwithstanding anything contained in this Act, in the case of a minor inam all arrears of rent payable by a person to an inamdar in respect of any land in such inam and outstanding on the appointed day shall, to the extent to which such arrears are in excess of the rent due for three fasli years in respect of that land, be deemed to be discharged whether or not a decree has been obtained therefor if such person pays to the inamdar the arrears of rent due for a period of any three fasli years,

(2) In any suit or proceeding for the recovery of any arrears of rent referred to in sub-section (1), the Court or authority concerned shall, upon deposit in the Court or before the authority or upon proof by the ryot of the payment, of arrears of such rent for three fasli years, dismiss the suit or proceeding.

(3) If before the appointed day any decree or order has been passed in any suit or proceeding for the recovery of any arrears of rent due from a ryot, which is inconsistent with the provisions of this section, the Court or authority concerned shall, upon deposit in the Court or before the authority, or upon proof of the payment, of the arrears of rent due from the ryot for any three fasli years and on the application of any person affected by such decree or order whether or not he was a party thereto, vacate the decree or order :

Provided that nothing contained in this section shall apply to any suit or proceeding in which the decree or order has been satisfied in full, before the appointed day.

(4) ....

Explanation For the removal of doubts it is hereby declared that the payment, or deposit of arrears of rent for three fasli years referred to in this section shall be payment or deposit made after the appointed day."

The appointed day under the Minor Inams Act is the date which the Government appoints by notification as the one on which the Act shall come into force The provisions in the Leaseholds Abolition Act, section 43 is identical with the provisions in the Minor Inams Act.

It is contended for the petitioners that the provision for extinguishing the arrears is on the face of it a deprivation of property and has no place in any scheme of agrarian reforms. The provision is challenged as beyond the legislative competence of the State and as one wholly unrelated to the scheme of the Acts in question. It is pointed out that with reference to several of the 'new inam estates' the ryots had deliberately withheld the rents contending that the properties were estates coming under the Rent Reduction Act and the landlords had to institute proceedings and secure declarations that they were not estates at all under the Estates Land Act. In Writ Petition No 1552 of 1965, the present first petitioner had instituted a suit for declaration that the property was not an estate within the meaning of the Rent Reduction Act, and the proceedings initiated by the State under the said Act were *ultra vires*. The State supported by several tenants opposed the claim and on the present petitioner succeeding in securing a declaration in the suit that the suit village was not an estate to which the Rent Reduction Act applied, the State came up in appeal to this Court in A S No 566 of 1955 This Court on the 5th of January, 1959 upheld the decision of the trial Court, accepting the contention of the present petitioner that it was not an estate at all under the Estates Land Act even after the Amendment Acts 1936 and 1945. The petitioners subsequently instituted about 34 suits and obtained decrees for amounts totalling Rs 62,471-75 P. There are suits pending for arrears totalling about Rs 4,188 and the arrears in respect of which suits have not been filed exceed Rs. 23,000 Many of the decrees obtained, it is stated, are pending execution It is stated that there are several other inamdars in similar position The argument is that the provision for wiping of arrears cannot fall under Entry 43 of List III and it is a case of deprivation of money without compensation

Considerable reliance was placed by learned Counsel for invalidating the provision, on the decision of the Supreme Court in *Durbanga case*[1]. In that case the Supreme Court has struck down two of the provisions of the Bihar Land Reforms Act and one of the provisions, section 4 (*b*), related to arrears of rent By that provision all arrears of rent including royalties and all cesses together with interest, if any, due thereon for any period prior to the vesting of the estate in the State which were recoverable in respect of the estates or tenures of the proprietors or tenureholders and the recovery of which was not barred by any law of limitation, vested in the State and were made recoverable by the State. Fifty percent. of

1. (1952) S C.J. 353: (1952) S.C.J. 427. (1952) S.C J. 446: (1952) S.C R. 889.

the arrears of rent was made re-payable to the proprietor along with compensation, that is, the State took over all the arrears and decided to refund 50 per cent. of the arrears and forfeit the rest to itself It is the validity of this provision that was in question in *Darbhanga case*[1], and this question was considered independently of the validity of the acquisition of estates. Mahajan, J , (as he then was) held that the provisions stood on the same footing as other debts due to Zamindars or other movable properties of the Zamindars which it was not the object of the Act to acquire observing that the only purpose of acquisition of the arrears was to raise revenues to pay compensation to some of the Zamindars whose estates were taken, but that purpose did not fall within any definition however wide of the phrase 'public purpose' The law to that extent was therefore unconstitutional. Mukherjee, J , (as he then was), invalidating the provision observed at page 960:

"On the face of it the legislative provision purports to have been made in exercise of the powers conferred on the State Legislature under Entry 36 of List II and Entry 42 of List III of Schedule VII of the Constitution In my opinion, this is a mere device or pretence and the real object which the legislation intended to accomplish is to deprive a man of his money which is not ordinarily a subject-matter of acquisition, in exercise of what are known as powers of eminent domain by the State, without giving him anything in exchange , and under the guise of acting under Entry 42 of List III, the Legislature has in truth and substance evaded and nullified its provisions altogether "

At page 962, the learned Judge further observed.

"Stripped of all disguise, the net result of the impugned provision is that it would be open to the State Government to appropriate to itself half the arrears of rent due to the landlord prior to the date of the acquisition without giving him any compensation, whatsoever "

When it was contended on behalf of the State that the provision was incidental to the primary object of the Act and could be maintained as essential in legislation for land reforms and land tenures coming under Entry 18 in List II, Das, J (as he then was) observed at page 972.

"Further, the impugned Act purports to acquire all arrears of rent and a law for acquisition of the arrears of rent cannot possibly be said to be a law with respect to matters specified in Entry 18 in List II for it cannot be supposed to be a law relating to the collection of rent within the meaning of that entry."

Dealing with the argument of the Attorney-General that legislation under Entry 42 can also lay down principles that would lead to the non-payment of any compensation and the reliance by the Attorney-General on *United Provinces* v. *Atiqua Begum*,[2] Chandrasekhara Aiyar, J , observed at page 1010

"There is nothing in *Antiqua Begum's case* that supports the argument It was there held that under the head 'payment of rent' there could be legislation providing for remission of rent. Payment of rent is not a legal obligation of every tenure and the Legislature can enact that under certain circumstances or conditions there shall be remission of rent But as regards compensation for State acquisition, its payment is a primary requisite universally recognised by law This is the essential distinction to remember when we seek to apply the case quoted "

Proceeding the learned Judge observed with reference to the vesting of arrears of rent.

"any public purpose in taking them over is conspicuous by its absence It is fairly obvious that resort was had to the arrears either for augmenting the financial resources of the State or for paying compensation to the smaller proprietors out of this particular item of acquisition " (Page 1014).

But there is a vital distinction between the provisions in the Bihar Land Reforms Act which was struck down by the Supreme Court as unconstitutional and the provisions relating to arrears of rent in the impugned Acts. Here the arrears of rent do not vest in the State. There is no question here of acquisition of arrears of rents by the State whether they have merged in decrees or not as in the Bihar Act. Apart from the fact that after the Fourth Amendment of the Constitution even the question of public purpose which was considered by some of the learned Judges in the *Darbhanga case*[1], to be justiciable is no longer open to judicial scrutiny where Article 31-A applies, this is not a case, of the State to any extent benefiting by the

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1. (1952) S.C.J. 354 : (1952) S.C J. 427 : (1952) S C J. 446 1952 S.C R 889

2. (1939-40) F L J (F.C.) 97 (1941) 1 M L.J. (Sup) 65 (1940) F.C R 110 A I.R. 1941 F C 16.

arrears. Two of the learned Judges who formed the majority in the *Darbhanga case*[1], base their decision regarding the invalidity of the provisions in respect of arrears of rent mainly on the ground that there was no public purpose behind that acquisition. In this connection we have to refer to Article 31 (2-A) introduced by the Fourth Amendment

> "Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

It follows that there is no question of acquisition of the arrears of rents for the impugned section in the Acts to come under Article 31 (2).

Now the field of legislation under Entry 18 of List II, covers relation of landlord and tenant and *the collection of rents.* There is no reason to limit the content of the Entry, particularly the words "the collection of rents". It can well include remission of rents. It was observed by Gwyer, C.J., in the Federal Court in *Atiqua Begum's case*[2]. with reference to Entry 21 of the Provincial List corresponding to the present Entry 18.

> "The general descriptive words in item No. 21, include 'the collection of rents'; and if a Provincial Legislature can legislate with respect to the collection of rent, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection."

Clearly the impugned provision is within the legislative competence of the State and no question of colourable legislation can arise. Though the provision may be severable, it cannot be said to be unrelated to the object or the scheme of the legislation. The provision provides ameliorative relief to the agrarian population in the villages. It must be noted that the tenants do not get automatic discharge of all arrears due by them. An option is given to them and if they want to claim the benefits of the measure, they are bound to pay a portion of the rent in arrears. A period is fixed for the payment and the exercise of the option. May be that the inamdars had obtained decrees; but the tenants have to an extent to pay the costs incurred by the inamdars, if they seek to avail themselves of the provision for scaling down the arrears of rent. It is in one sense beneficial to the parties concerned; the burden of the previous arrears having been discharged, one may expect the cultivator to apply himself to the land without further worry. The bulk of the tenants are generally tardy in the payment of rents and when once the rents fall into arrears the tenants find it difficult to pay the current rent in full while liquidating the arrears even in part. So while a part of the arrears is cleared the current rent falls into arrear. And as for the landlord it is common knowledge that his difficulties start with securing a decree. Endless execution proceedings have to be taken by the landlord before he is able to realise his dues and he saves the costs and tribulation of execution proceedings and uncertainties of realisation of the full amounts by providing for partial discharge on ready payment of a portion. It may be that in many cases the provision gives a shattering blow to the landlord's economy.

But there can be no doubt that any scheme of agrarian reforms and bettering of the conditions of the agriculturists who work on the land can properly envisage lightening the burden on them of accumulated arrears of rent. Provisions in this regard are legitimately ancillary to land reforms and get integrated with the core of necessary agrarian legislation. Also Article 31-A covers not only legislation for the acquisition by the State of any estate or of any right therein, but also legislation for the extinguishment or modification of any rights in estates. In *Gangadhara Rao* v. *State of Bombay*[3], a case arising under the Bombay Personal Inams Abolition Act, 1953, when it was contended that the right of the inamder to appropriate

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1. (1952) S.C.J. 354 : (1952) S.C.J. 427 : (1952) S.C.J. 446 : 1952 S.C.R. 889.
2. (1939-40) F.L.J. (F.C.) 97 : (1940) F.C.R. 110 : (1941) 1 M.L.J. (Supp.) 65 : A.I.R. 1941 F.C. 16.
3. (1961) 2 S.C.J. 398 : A.I.R. 1961 S.C. 288 to 290.

to himself a part of the full assessment which was left over after he had paid the quit rent to the Government is not a right in an estate, Wanchoo, J., speaking for the Court observed:

"This contention also has no force Inams being estates, the right of the inamdar to retain part of the full assessment over and above the quit rent payable to the Government arises because he holds the inam estate The right therefore can be nothing more than a right in an estate"

Similarly, here the arrears arise and are due to the inamdars in relation to the inam estates which they hold. In *Ranjit Singh* v. *State of Punjab*[1], the question was, whether the provisions of a law for the transfer of the village common land owned by the proprietors, to Village Panchayat for the purpose of management in the manner provided and the conferring of proprietory rights on non-proprietors in respect of lands included within the boundaries of the village site was *ultra vires* Article 31 as no compensation was payable and whether the law was protected by Article 31-A. After stating that the view of the Supreme Court was in favour of giving large and liberal meaning to the term 'estate, rights in an estate,' and "extinguishment and modification of such rights" in Article 31-A, it is observed by Hidayatullah, J., speaking for the Court:

"The scheme of rural development today envisages not only equitable distribution of land so that there is no undue inbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few, on the other, but envisages also the raising of economic standards and bettering rural health and social conditions . . .."

Reference may be made, while emphasising that legislation relating to collection of rents can be integrally connected with any scheme of agrarian reforms and may be necessary for affecting agrarian reforms, to the observations of Gajendragadkar, C J., in *Sajjan Singh* v. *State of Rajasthan*[2].

"Thus, it would be seen that the genesis of the amendments made by Parliament in 1951 by adding Articles 31-A and 31-B to the Constitution, clearly is to assist the State Legislatures in this country to give effect to the economic policy in which the party in power passionately believes to bring about such needed reform It is with the same object the second amendment was made by Parliament in 1955, and as we have just indicated, the object underlying the amendment made by the impugned Act (Seventeenth Amendment) Act is also the same Parliament desires that agrarian reform in a broad and comprehensive sense must be introduced in the interests of a very large section of Indian citizens who live in villages and whose financial prospects are integrally connected with the pursuit of progressive agrarian policy."

In our view, it is needless to labour on this aspect of the matter further for upholding the validity of the provisions for writing off arrears, as the unreported decision of this Court in *Raja Rao Suguna Kumaran* v *State of Madras*[3], referred to by learned Counsel for the petitioners in another context is a direct decision on the point with reference to similar provision found in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. As stated at the beginning, the three impugned Acts follow the pattern of the Estates Abolition Act (XXVI of 1948). The second proviso to section 55 (1) of the Act (XXVI of 1948) runs thus:

"Provided further that where the ryot—

(*a*) has paid before the notified date or pays within two years of that date, or

(*b*) where the rate of rent for the land has not been fixed under the Madras Estates Land (Reduction of Rent) Act, 1947, before the notified date, pays within two years of the date on which such rates of rent are fixed under that Act, the rent due for the fasli years 1356 and 1357 and any interest payable thereon together with any costs which may have been decreed, then, all arrears of rent due from such ryot in respect of all prior fasli years, including interest and costs, if any, shall be deemed to have been completely discharged"

In the case cited, taking inspiration from the decision of the Supreme Court in the *Dharbanga case*[4], it was argued before Rajamannar, C J., and Venkatarama Ayyar, J., that the above provision in section 55 under which on payment of rent due for fasli 1356 and 1357 and the interest due thereon and costs if any decreed all prior arrears stood discharged, was unconstitutional. Overruling the argument the learned Chief Justice observed:

1 (1966) 1 S C J 462 A I R 1965 S C 632 at 638.

2. (1965) 1 S C J 377 A I R 1965 S C 845 at 853.

3 C M P Nos 7812, 11820 of 1950, etc

4 (1952) S C J 354 (1952) S C J 427: (1952) S C J 446 (1952) S.C.R. 889

"Obviously he (Counsel for the petitioners) could not say that the arrears so wiped away were being acquired by the Government So far as I understand him, his contention evidently was that the Legislature was not competent to enact such a provision This ground is not open to the learned Counsel in view of the decision of the Federal Court in *United Provinces* v *Atiqua Begum*[1], in which a similar provision was held to fall within the scope of Entry 21 in List II of Schedule VII of the Government of India Act which included "land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents " In that case the United Provinces Government directed a remission of the rents payable by tenants to their landlords in view of an unprecedented fall in the prices of agricultural produce This remission was declared by the High Court unauthorised and inoperative So in 1938 the Legislature passed an Act called the Regularisation of Remission Act which precluded any question as to the validity of the orders of remission being raised in Courts This Act was attacked as *ultra vires* of the Legislature and that it was not within the competence of the Provincial Legislature It was held by the Federal Court that the impugned Act was legislation with respect to the " collection of rents " within the meaning of Entry 21 of List II . I have no doubt that legislation with respect to the remission of rents is legislation with respect to a matter included in Item 21 "

This decision in our view is a complete answer to the contention of Counsel as to want of legislative competence for the impugned provisions.

We have already indicated that the legislation fulfils the requirement of Article 31-A (1) (*a*) We have held that Act XXVI of 1963, Act XXVII of 1963 and Act XXX of 1963 fall under the expression 'estate' in Article 31-A. We, therefore, conclude that the three impugned Acts are fully covered by Article 31-A of the Constitution and are protected from attack against their constitutionality on the score of any of the provisions of the Acts being violative of the fundamental rights guaranteed under Articles 14, 19 and 31 of the Constitution. In *Gangadhara Rao* v. *State of Bombay*[2], it is stated ,

" It is true that by sub-section (5) of section 17 no compensation is to be paid for the loss to the inamdar of what he used to get because of the difference between the quit-rent and the full assessment It is however clear that Article 31-A saves the Act from any attack under Article 31 which is the only Article providing for compensation "

It follows that the validity of the Acts cannot be questioned even on the ground that no compensation whatsoever has been provided for the acquisition of certain specific interests.

On this conclusion strictly speaking it is unnecessary to have any elaborate survey of the provisions of the Acts and examine whether and if so to what extent they are violative of Articles 14 and 31 of the Constitution. However, having regard to the learned arguments, and the scathing criticisms of the Acts from Counsel for the inamdars we shall briefly refer to the more impressive of them, with reference to the Inam Estates Abolition Act. The same would cover the corresponding provisions in the other Act except as regards the determination of the total amount of the compensation. Our attention is drawn in particular to section 30 (1) of the Act by which the ryotwari assessment imposed on all lands in an inam estate in respect of which any person is entitled to ryotwari patta under section 11, is excluded in determining the basic annual sum. It is contended that private lands are indisputably properties in which the full proprietorship is vested in the inamdar and by defining private lands in a manner totally unrelated to the inam tenure as has obtained in these parts and the normal mode of enjoyment of the lands, securing of ryotwari pattas under the Act by the landholder is made extremely difficult The conditions requisite for securing a ryotwari patta, it is pointed, cannot ordinarily be expected to be complied with, as there have been statutes operating during the relevant period which would make it impossible for the inamdar to comply with the requirement as to personal cultivation for securing ryotwari patta. Under the Act, even when it is established that certain lands are private lands of the landholder, he will not be entitled to a ryotwari patta, unless it is proved that the lands have been cultivated by the landholder himself with his own servants or hired labour in the ordinary course of husbandry for a continuous period of three years within a period of 12 years immediately before the first day of April, 1960. The practice of a landholder generally has been to grant short term lease of private

1 (1939) 40 F L J (F C) 97 : (1941) 1 M.L.J. (Supp.) 65 : (1940) F C.R. 110.

2. (1961) 2 S C.J. 398 : A I.R. 1961 S.C. 288 at 290.

lands for fixed payments of grain or cash. Occasionally the rent may be a share of the produce. In regard to religious, educational and charitable institutions, short term leases is the normal method of enjoying the income from private land. While the inamdar happens to be a woman, the only convenient mode of enjoyment is to grant short term lease. The Madras Tenants and Ryots Protection Act (XXIV of 1949), the Madras Cultivating Tenants Protection Act (XXV of 1955) and similar tenancy legislations have during the relevant period made it impossible for the proprietor to secure possession of his private lands for personal cultivation as now required under the Act. Counsel pointed out that if by reason of the stringent provision of section 9 and the requirements of section 11, a landholder is unable to secure ryotwari patta, he will not only be losing the land but also by reason of section 30 (1) have no compensation for the land in question, the assessment of the land getting deducted from the basic annual sum. This, it is submitted, is nothing but naked confiscation by the device of definition. But the argument in the ultimate goes to the question of adequacy of compensation. One of the elements that should properly be considered and provided for in fixing the compensation is omitted, resulting in inadequacy of the compensation.

It is further urged that the basis of compensation, the ryotwari demand on ryotwari assessment after settlement to be carried out hereafter, is not a principle on which an estate yielding present income can be valued for the purpose of compensation. It is submitted that the ryotwari demand is the opposite of income being an outgoing and cannot therefore be taken as the basis for ascertaining the basic amount for capitalisation. We are unable to appreciate why the ryotwari assessment cannot form the basis for determining the basic annual sum. It may be that the ryotwari assessment is in the nature of tax. But the assessment under the ryotwari settlement is fixed with reference to the quality of the soil and on the principle that the land revenue should represent a fixed proportion of the net and not of the gross produce. The settlement procedure is an elaborate one and the calculation of the produce and the assessment once made continues in force for a number of years Ultimately, no doubt, the ryotwari demand is an outgoing, but essentially it is a fraction of the income, may be an insignificant portion of the gross produce. Taking the ryotwari demand as a basis may adversely affect the quantum of compensation, but certainly the process of ascertaining the basic annual sum by reference to the ryotwari demand is not so unrelated to the subject that it cannot be regarded as a relevant principle on which compensation may be determined.

Attack is then made on the manner of computation of net miscellaneous revenue which is a component of the basic annual sum. By section 27 the net annual miscellaneous revenue is the average of the net annual income derived by the Government from the miscellaneous sources during the fasli year commencing on the notified date, if it was notified on the 1st of July, or on 1st of July immediately succeeding the notified date, if such date was not the 1st day of July and the next fasli year in case the ryotwari settlement is effected in that year or the next two fasli years in other cases. Learned Counsel submits that unmasked here is a provision which excludes altogether the actual income which has been derived from the property by the inamdar and introduces artificial standards for determining the income or profits. It is submitted that the Government may or may not exploit the available resources and derive the normal miscellaneous income that can be had If on account of mismanagement or for other reasons the Government does not derive income from these sources, the proprietor would not have any compensation under this head. The submission is that these masked provisions aimed at confiscation of private property, and it is said that the relevant provisions neither lay down nor are based on any principle of compensation. It is contended that there is no principle for the ascertainment of compensation which the law can recognise as such. But here again it is not a question of principle that is being challenged in reality. The sum and substance of the charge is in the apprehension that the

quantum of compensation that will be ultimately assessed on the principle may be too low.

This feature in the provision relating to compensation, it is stated, affects seriously and to a considerable degree, cases where the miscellaneous income is the main source as in the case of the petitioners in Writ Petitions Nos. 1790 and 2130 of 1965. Writ Petition No. 1790 of 1965 relates to Inam Chetty Chevadi Jaghir in Salem Taluk, Salem District. This is claimed to be a part inam village and the Government have issued a memorandum on 28th February, 1950, that the lands in the village are not ryoti lands, and that no action under the Rent Reduction Act is called for. There are rich magnesite mines in the inam and the inam was purchased by the Magnestie Corporation of India for a sum of Rs 10 lakhs in view of the mineral wealth. Under the scheme sanctioned by the High Court in Company Petition No. 46 of 1962 the entire property is vested in the petitioner Dalmia Cement (Bharat) Limited and the mining operations are being carried on under two agreements. Besides the mines, it is stated that there is only a mango thope but there are large extent of waste lands and house sites capable of fetching lakhs of rupees. In Writ Petition No. 2130 of 1965 the inam involved is one of the five hill estates situated iu the Kalroyan Hills. The inams are Jagirs granted to reward the Jagirdars for service rendered to the former Government and the income of the Jagirs is noted as having been derived by the imposition of tax on ploughs at Rs. 1-4-0 per plough, and poll tax. The forests are rich in timber and other forest produce. Besides, considerable income is derived from sandalwood. The petitioner would question whether at all the property could be considered to be an income.

In our view, the method by which the miscellaneous income from the inam has to be ascertained cannot be said to be so artificial and divorced from reality as to be termed not a principle for ascertainment of compensation. Here again the attack ultimately resolved itself into a question of adequacy of compensation. Besides in our view the apprehensions that the available resources of miscellaneous revenue may not be exploited by the State during the relevant period to the detriment of the landholder are groundless. Under section 34 of the Act there is provision for notice to the landholder and reasonable opportunity for making his representation in writing or orally at the time of determination of the basic annual sum and the total of compensation payable. The net annual miscellaneous revenue under section 27 of the Act shall be the average of the net annual income derived by the Government during the prescribed period. The Legislature does not contemplate the Government to stop earning income from the miscellaneous sources immediately after taking over, even though income was being derived prior to the notified date by the landholder and was derivable even after the date in the normal course. The estate is vested in the Government with all its resources and the exercise of the power in the matter of exploiting the available resources which had been yielding income will benefit the landholder by the provisions of the statute. In such circumstances, it may properly be contended that the word 'derive' should be construed as imposing a duty on the Government to derive an income from the sources which have been yielding income to the landholder prior to the vesting of the estate in the Government. The landholder has been conferred a right by the Act to have the net income included in the basic annual sum for the computation of compensation payable to him. Reference in this connection may be made to the observations of Lord Cairns in *Federic Guilder Jullus* v. *The Lord Bishop of Oxford*[1], in discussing the words 'it shall be lawful'.

"...... But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so "

Lord Blackburn remarks in the same case at page 241 :

"If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when re-

1. (1880) L.R. 5 A.C. 214 at 222 and 223.

quired on their behalf Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it "

In the writ petitions filed by religious institutions, temples and mutts, churches and educational and charitable institutions, the provison for payment of tasdik allowance under section 32 annually instead of payment of compensation in a lump sum is questioned as a denial of compensation. It is further pointed that section 32 (2) ignores the average income derived by the institution immediately before the notified date for the purpose of fixing the allowance and making up deficiencies. The average annual net income derived by the institution during the five completed fasli years immediately preceding fasli year 1357 or during that portion of those fasli years in which the inam estate or part was held by the institution, is adopted It is stated that during the period the prices of grain and agricultural produce were comparatively low. On behalf of these institutions, it is stated that the annual allowance provided by the Act can hardly meet their requirements The value of paddy at the current rates, it is stated, is about Rs 23 per kalam while the value of paddy in the years immediately preceding fasli 1357 was about Rs 7 per kalam. The crushing blow suffered by religious and charitable institutions is illustrated by reference to Writ Petitions Nos 2081 and 3923 of 1965 Writ Petition No. 2081 of 1965 relates to the village of Mangal belonging to the Mantrapureeswaraswami Temple, Kovilur, Thanjavour District, the tenure as to which was the subject of consideration by the Judicial Committee in *Naina Pillai Marakkayar* v *Ramanathan Chettiar*[1]. The Judicial Committee held in that case that the grant was of all the lands in the village of Mangal including melwaram and kudiwaram and the occupancy rights over the lands vested in the temple. The Judicial Committee has noticed that the temple must have derived from the village under its original Sanad an income sufficient for the maintenance of pooja worship at the temple, and that it must have obtained that income from the cultivation of the village lands either by its servants or by its tenants It is submitted that the Madras Rent Reduction Act (XXX of 1947) was not applied to the village, as all the lands in the village were recognised as the private lands of the institution Writ Petition No. 3929 of 1965 relates to the Inam village of Sellur belonging to Sri Navaneetheswaraswami temple, Sikkil. The temple was the *ekabogam* mirasadar of the village and entitled to full occupancy and cultivation rights in the whole of the village lands From about the year 1917, the temple was able to take possession of all the lands and carry on personal cultivation with pannai servants and hired labour till departmental instructions were issued by the Hindu Religious Endowments Board that the lands should be leased out In 1945-46, about 40 velies in extent of cultivable lands were leased out for a period of three years annually, the lease expiring in April, 1948 or April, 1949. The lessees on the expiry of the lease period claimed occupancy rights under section 8 (5) of the Madras Estates Land Act as amended by the Madras Act XVIII of 1936 and the question came up for consideration before the Full Bench in *Navaneethaswaraswami Devasthanam* v. *Swaminatha Pillai*[2]. The Full Bench held that where before 31st October, 1946, a landholder has granted a lease of land situated in a village referred to in section 8 (5) of the Madras Estates Land Act for a term which runs beyond 31st October, 1948, the terms of the lease remain in force even after 31st October, 1948, and the lease does not stand determined by reason of section 8 (5) and the lessee does not become a ryot and get occupancy rights It is pointed out that while some of the lessees had surrendered possession others held on and had to be evicted by process of Court and that for reasons beyond its control, the Devasthanam which had right to get back possession of all the lands in 1948-49 could not recover actual possession of all the lands on or before 1st July, 1950. It is contended that the provisions regarding the grant of patta to the inamdars in the impugned Act are such that for no laches on the part of the Devasthanam it may in the circumstances be deprived of valuable proprietary rights over its lands to the detriment of the Devasthanam's income. Here again the question ultimately resolves itself into one of adequacy of compensation. Under section 3 (*b*) of the

1. L R 51 I.A. 83 : 46 M.L.J. 546 : I.L.R. 47 Mad. 337.
2. (1958) 2 M.L.J. 281. (F.B.)

Act, the entire inam vests in the Government and the landholder or any other person whose rights stand transferred under clause (*b*) of section 3 and are ceased and determined under clause (*c*) of the section, is entitled only to such rights and privileges as are recognised or conferred on him by or under the Act After the land has vested in the State, the State as the owner has got a right to deal with the property in any proper manner carrying out its professed policy of land reforms and settling of the land on the cultivator The provisions of the Act, may fall on the inamdars very harshly in particular cases, and there may be drastic cut in their income But the question for consideration eventually by the Court is one of competency of the Legislature to enact the particular statute.

It is said that the reduction in the income of the religious institutions and Mutts under the provisions of a statute relating to land reforms affects the fundamental rights of these institutions guaranteed under Articles 25 and 26 of the Constitution. It is urged that the institutions will not have sufficient income to maintain themselves and to perform their religious obligations In our, view, it may be an indirect effect, not a necessary consequence , certainly it is not the object of the Act even remotely to interfere with religious practices The guarantee under our Constitution protects the freedom of religious opinion and also acts done in pursuance of a religion While the State cannot regulate the religious practices, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality there is no bar against statutes which may affect the activities of religious bodies which are economic or commercial in character for the reason that the statutes may affect the income of the religious bodies It has been observed by the Supreme Court in *The Commissioner, Hindu Religious and Charitable Endowments* v. *Sri Lakshmindra Thirutha Swamiar*[1], that in certain circumstances the scale of expenses to be incurred in connection with religious observations would be a matter of administration of property belonging to a religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent Legislature. Article 26 guarantees to religious denominations only rights to acquire and own property and administer the property in accordance with law, but does not prevent properties belonging to a religious body being acquired by authority of law.

Learned Counsel contends that the compensation when paid as tasdick allowance is reduced to a mere pension and cannot be considered to be the just equivalent to the property taken away in which the institutions had absolute proprietory rights. In this connection *Maharayal Mohansinghji Jayasinghji* v. *The Government of Bombay*[2] where it was held that the Pensions Act of 1871 applied to grants of money in respect of or in substitution for some right, privilege, perquisite, or office, was referred to The Judicial Committee in that case held that an allowance of money by the Government under an arrangement with plaintiff's ancestors in lieu of a bulk paymen theretofore received by them fell within the Pensions Act and the Civil Courts could not take cognisance of a suit relating thereto We do not see how that case has any relevance to the question at present in issue Here the statute has provided an annual allowance, a permanent annuity, as compensation for the acquisition Considering the nature and character of the property acquired, the purpose of the acquisition and the persons holding the property, instead of a lump sum payment, provision has been made for yearly allowance Under section 32, payment to the institution shall be made so long as the institution exists. Article 31 (2) of the Constitution provides that the law providing for acquisition should specify also the manner in which the compensation is to be given It may be that the method of payment is open to some objection, we are not pronouncing on its tenability, but we think it unnecessary to go at any length into the question The drastic deprivation of the just equivalent by the operation of section 30 (1) of the Act is illustrated by learned Counsel by reference to Writ Petitions Nos 2081 and 3929 of 1965 where neither the temple nor the cultivator in possession may be able to secure pattas under sections

1 (1954) S C J. 335 (1954) 1 M L J 596 (1954) S C R. 1605 A I.R 1954 S C 282

2. L R 8 I A 77

9 and 10 of the Act for the private lands leased out and coming under section 8 (5) of the Madras Estates Land Act. Pattas in such cases may be granted only under section 11 of the Act and then by reason of section 30 (1) of the Act the ryotwari assessment imposed on the lands in question gets excluded in determination of the basic annual sum. The result, it is submitted, is that for large extents of lands the temple neither secures patta nor compensation for the loss. It may be that particular institutions or individuals are hit hard by the Act. But that cannot invalidate the Act itself. In the *State of Bihar* v. *Sir Kameshwar Singh*[1], Mahajan, J., as he then was remarked :

> " From the premises that the estates of half a dozen zamindars may be expropriated without payment of compensation, one cannot jump to the conclusion that the whole of the enactment is a fraud on the Constitution or that all the provisions as to payment of compensation are illusory. At best they are only illusory in the case of some only of the large body of persons affected by it. "

The arguments on behalf of the State is that compensation is determined for the inam estate as a whole and not separately for each of the interests therein. This is the answer also to the charge, that for vacant house sites in these inams which of late have become very valuable no compensation is provided. The Act specifies the principles on which and the manner in which compensation should be determined and given for the inam estate. This is all that is required of a law relating to acquisition of property under Article 31 (2) of the Constitution. In *Messrs. Burrakur Coal Co Ltd.* v. *Union of India*[2], examining the provisions of Coal Bearing Areas (Acquisition and Development) Act, 1957 (Central) and meeting the argument that though there was provision for payment of compensation, the relevant section,—section 13—did not contain any provision for payment of compensation for mineral rights, while the *Explanations* to clause (*a*) of sub-section (5) of the said Act laid down that in computing compensation for the land the value of the minerals shall not be taken into account, and therefore, the acquisition of mineral right would be impermissible under Article 31 (2), Mudholkar, J., observed :

> " Here compensation is specifically provided for the land which is to be acquired under the Act. The land includes all that lies beneath the surface or as Mr Das put it all that is 'locked up' in the land. Parliament has laid down in sub-section (5) of section 13 how the value of this land is to be calculated. The contention that the provisions made by Parliament for computing the amount of compensation for the land do not take into account the value of the minerals is in effect a challenge to the adequaracy of the compensation payable under the Act. The concluding words of Article 31 (2) preclude such a challenge being made. "

It is remarked :

> "The learned Attorney-General quite rightly pointed out that section 13 deals with the whole subject of payment of compensation to the owner or lessee of the mine for his entire interest in the land including the rights to minerals and even though that section specially says that the value of the minerals cannot be taken into account in determining the amount of compensation, the concluding words of Article 31 (2) preclude the petitioners from challenging the law. "

Learned Counsel for the inamdars is no doubt on firm ground where the attack is on section 31 of the Act providing for the determination of the total compensation in cases not governed by section 32. Under the impugned Act by section 31 the total compensation is kept down at certain levels ; it is determined by multiples of the basic annual sum, slabs are provided for the basic annual sum, the multiplier of the basic annual sum that makes up the total compensation getting lower and lower as the basic annual sum goes up. Where the basic annual sum does not exceed Rs. 1,000 the total compensation is 30 times the basic annual sum. Where the annual sum exceeds Rs. 1,000 but does not exceed Rs. 3,000 the multiplier which gives the total compensation is 25 or the compensation is Rs 30,000 whichever is greater. The next slab provides for basic annual sums between Rs. 3,000 and Rs. 20,000 and the multiplier is 20 or the compensation is Rs. 75,000 whichever is greater and so on the compensation gets scaled down. When the basic annual sum exceeds one lakh, the multiplier is 12½ or the compensation is Rs. 15 lakhs whichever is greater. This method of providing for compensation with progressive cuts with the increase in the basic annual sum is clearly discriminatary and violative of

1. (1952) S.C.R. 889 at 947. at 963.
2. (1962) 2 S.C.J. 216 . A.I.R. 1961 S C. 954

Article 14 of the Constitution where that protection is available. Similar provisions fixing the compensation has been struck down by the Supreme Court *Kunhikoman v State of Kerala*[1], and *Krishnaswami* v. *State of Madras*[2] But as the Act is covered by the President's assent under Article 31-A the petitioners can have no relief on that ground.

But this conclusion of ours does not preclude the contention that particular properties sought to be covered by Acts XXVI and XXX of 1963 are not inams at all An argument is developed that though the properties might have been inams on the 26th January, 1950, when the Constitution came into force, they ceased to be inams even before the impugned Acts came into force It is submitted that the essential requisite for a property to be an inam is that with reference to the property there must be a remission of the whole or part of the revenue and that as under the Madras Inams (Assessment) Act (XL of 1956) full assessment has been levied on inam lands, there was no inam for the Acts to operate upon It is one thing to say that the Acts are constitutionally valid with reference to properties which were inams on the 26th of January, 1950 ; it is quite a different thing to contend that though the Acts may be constitutionally valid, the properties which are sought to be acquired by the Government as inams are not inams when the acquisition is made. There can be no doubt that when any property had ceased to be an inam when the relevant Act came into force, it could not vest in the Government as an inam estate or minor inam as the case may be. But the question cannot be decided in the abstract, it is a question for consideration in each case whether the particular property has ceased to be an inam by the operation of the Madras Inams (Assessment) Act. In *Bachharam Datta Patil* v. *Viswanath Pundhik Patil*[3], the Supreme Court stated:

"But it has been argued on behalf of the appellant that it is common ground that the Sanadhi inam lands were once watan property and that once the property is impressed with the character of the inam lands, they continue to bear that character because the Government have not been authorised by any law to change their character No precedent or statutory provisions directly supporting this wide proposition have been brought to our notice But our attention was called to the provisions of section 15 which make it permissible for the Collector to commute the service and relieve the holder of Watan and his heirs and successors in perpetuity of their liability to perform the service on such conditions as may be agreed upon If we have been able correctly to appreciate the argument based upon section 15, it was sought to be made out that the service in respect of the Watan lands in question may have been commuted, but even after the commutation of the service the Watan remained and the lands continued to retain the character of Watan lands. This argument assumes that even upon the service being entirely dispensed with in perpetuity the Watan character of the land continued. That is begging the question. Further more, clause (1) of section 15 contemplates commutation 'upon such conditions, whether consistent with the provisions of this Act or not, as may be agreed upon by the Collector and such holder.' Thus the conditions to be agreed upon between the holder of land which was once part of a watan and the Government at the time of the commutation may be of so many varieties that in some cases the Watan character of the land may be maintained, whereas in others the conditions agreed between the parties may themselves contemplate the cessation of that character...... It is possible to conceive of a case where the conditions agreed upon provide for the continuance of the Watan tenure in spite of the fact that the holders have been excused the performance of the customary service On the other hand, it may be that there were no conditions agreed between the parties continuing the Watan character of the land after dispensing with the service."

Learned Counsel for the petitioners drew our attention also to a decision of a Full Bench of the Kerala High Court in *Vasudevan* v. *State of Kerala*[4], where the Jenmikaran Payment (Abolition) Act, 1960 was held not entitled to the protection afforded by Article 31-A of the Constitution, as the Travancore Jenmi and Kudiyan (Amendment) Act, 1108 had transferred the ownership of the land from the jenmi to his kudiyan and had the effect of termination of the jenmikaran's Janmam right which is included in the expression 'estate' in Article 31-A

The consideration of the question raised involves an examination of the nature and character of inam tenure in this part of India. Inams are or very remote antiquity and variety in character and it is no easy task to trace their history with

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1 (1962) 1 S C J 510 : (1962) 1 M L J (S C) 213 : (1962) 1 An.W.R. (S C.) 213 A.I R 1962 S C 723

2. (1965) 1 S C J 239 : (1965) 1 An W.R (S C) 14 (1965) 1 M.L J (S.C) 14 : (1964) 7 S.C R 82 : A.I R. 1964 S C 1515.

3 (1956) S C J. 721 at 723.

4. A.I.R. 1964 Ker. 171. (F. B)

anything like precision. Inams fall into two broad classes, major and minor inams. When the grant is of the whole village it is called a major inam. When the grant is not of a village, but of isolated fields or blocks of land in a village, or share or shares in a village, that is grant of something less than a village it is known as a minor inam. The major inams, that is whole inam villages, where the grant was of the melwaram to a person not owning the kudiwaram, were brought into the definition of 'estate' even in 1908, under the Estate Land Act, iruwaram grants of whole villages were included under the category of estates There was an amendment of the Act in 1945 clarifying the effect of the 1936 amendment, with retrospective effect and since, to be an estate, the grant must of a named village or a whole village, and if it is of a named village or of a whole village, it does not affect the character of the village being an estate, if certain lands in the village are reserved for communal or other purposes, such as minor inams Under the Madras Estates Abolition Act (XXVI of 1948) as already pointed out inams which were estates prior to the 1936 amendment alone were taken over by the State in the process of agrarian reforms The Inams Estates Abolition Act (XXVI of 1963) now impugned covers the whole inam villages which are left out of the Estates Abolition Act of 1948, that is what are known as post-1936 estates, and besides, takes in under the definition 'part village inam estates' some minor inams. From the category of part village inam villages are excluded grants in inam expressed to be only in terms of acreage or cawnis or of other local equivalent Minor inams left out by Madras Act XXVI of 1963 are taken over by the State for effectuating its policy of a agrarian reforms unde the Minor Inams Abolition Act (XXX of 1963)

In the Law Lexicon by Ramanatha Iyer, 'inam' is thus defined at page 569:

"A gift, a benefaction in general, a gift by a superior to an inferior In India, and especially in the south, and amongst the Marathas, the term was especially applied to grants of landhold rent-free, and in hereditary and perpetual occupation, the tenure came in time to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assignment, the term was also vaguely applied to grants of rent-free land, without reference to perpetuity or any specified conditions The grants are also distinguishable by their origin from the ruling authorities, or from the village communities and are again distinguishable by pecualiar reservations, or by their being applicable to different objects."

In Maclean's of the Administration of the Madras Presidency, Volume III, Glossary, at page 352 inam is explained thus :

"Generally a gift from a superior to an inferior. So a grant of land for religious or charitable purposes made by Government sometimes given free, sometimes with light quit rent or jody. Same as Manyam. Technically a major inam is a whole village or more than one village and a minor inam is something less than a village"

The word 'inam' by itself is an Arabic word introduced in India after the Muhammadan conquest, the term used before that being Manyam The Hindu Sovereigns were ambitious of distinguishing their reign by the extent and value of the lands alienated by them in inams to the religious classes and inam grants were made in solemn and impressive manner In latter days inams came to be granted for numerous miscellaneous purposes to individuals, particular families or even communities, and the power to make such grants were assumed by petty chiefs, officers of Government and others It is found in Blair's Report on the Operations of the Inam Commission that considerable revenues were thus alienated, and of such origin are many inams granted by the zamindars, various Faujdars and renters in the Nothern Circars and by numerous Poligars of the Ceded Districts and in the southern provinces of the Madras Presidency The Muhammadan rulers continued the practice and added to the inams and the East India Company also in the earlier years followed the practice Later when the British administration in a way got settled, their attention fell on the large sacrifice of the State revenue involved by the inams. There was recognition by the administration of the importance of a general enquiry into the titles to rent-free lands and enactment of certain laws followed and several orders were issued on the subject. Steps were taken to prevent diversion of inam from the purpose for which it was granted Maclean's Manual of Administaration of the Madras Presidency, Volume I, at page 166, refers to inams, thus :

"In the south of India it is applied to the grant by the State (either originally or taking up a grant made by a village community) of the permanent right in one case to occupy land without paying rent to the State and in another case to collect Government assessment on land The tenure rent-free came in time in many cases to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assignments Such charge was called 'jody', that is to say, favourable rent or quit rent "

In Baden Powel Land Systems of British India (1822 Edition), Volume I, it is observed at pages 98 and 99

"Yet another class of tenures arises in connection with the State Revenue administration , and that is when the ruler either excuses an existing landholder from paying his revenue either wholly or in part or 'alienates' or assigns the revenue of a certain estate or tract of a country in favour of some chief, or other person of importance, or to provide funds for some special objects, or to serve as a recompense for services to be rendered

At first such grants are carefully regulated, are for life only, and strictly kept to their purpose and to the amount fixed But as matters go on, and the ruler is a bad or unscrupulous one,his treasury is empty, and he makes such grants to avoid the difficulty of finding a cash salary The grants become permanent and hereditary , they are also issued by officials who have no right to make them, and not only do they then result in landlord, tenures and other curious rights, but are burden to after times, and have furnished a most troublesome legacy to our Government when it found the revenues eaten up by grantees whose titles were invalid and whose pretensions, though grown old in times of disorder, were inadmissible

Such grants may have begun with no title to the land but only a right to the Revenue but want of supervision and control has resulted in the grantee seizing the landed right also " (Italics are ours) "

The Judicial Committee in *Lakshmana* v. *Venkateswarlu*[1], observe .

" Inams in the Presidency of Madras are of two kinds first, those where the proprietary right in the soil and the right to the Government share of the revenue derivable from land coalesce in the same individual, and secondly, those where the proprietary or occupancy right is vested in one or more individuals, whilst the Government share of the revenue has been granted to another (para 71, Mr W T. Blair s Report on the Operations of the Inam Commission, dated 30th October, 1869)

An inam holding may be of a field only, or village, or a tract of several villages (Land Systems of British India, by Baden Powell, Vol III, page 140)

Grants consisting of whole village or more than one village are technically called major inams to distinguish them from minor inams which are grants of something less than a village. "

The first step taken by the British Administration was to exclude inams from the Permanent Settlement Regulation XXV of 1802, and provide for recognition of the title of the inamdars on actual possession by Regulation XXXI of 1802. The title of the Regulation which is instructive is as follows :

" A regulation for trying the validity of titles of persons holding, or claiming to hold, lands exempted from the payment of revenue under grants not being Badshahi or Royal grants, and for determination of the amount of the annual assessment to be imposed on lands so held, which may be adjudged to be, or may become liable to the payment of public revenue in the British Territories subject to the Presidency of Fort St George . . .."

It is unnecessary for our present purpose to refer to the Regulations and Orders that followed. It is sufficient to state that in spite of Regulation XXXI of 1802, only in 1858 the Inam Commission was established to examine the title to the possession of the inams and to enfranchise them for a quit rent in lieu of the Government's right to resume The Inam Commissioner proceeding in right earnest, made elaborate investigation and enfranchised and confirmed the grants that were proved and title deeds were issued in favour of the holders Act IV of 1862 was passed to confirm and validate the title deeds given by the Inam Commissioner Then came the Madras Enfranchised Inams Act IV of 1866 and to clear the doubts raised by these two Acts and the language of the title deeds issued, Madras Inams Act VIII of 1869 was passed The Preamble to the Act and the single section of the Act set out hereunder have a value in the context of the present discussion.

" An Act to prevent doubts as to the true intent and meaning of certain words used in the title-deeds of inams heretofore furnished to inamholders by the Inam Commissioner of the Madras Presidency and to declare the true intent and meaning of Madras Act IV of 1862 and IV of 1866.

Whereas, under the rules sanctioned by the Local Government in the year 1859, and in the Fort St George Gazette, 1859, for the adjudication and settlement of inam lands in the Madras Presidency

1. L.R 76 I A 202 (1949) 2 M L J 500 ; I.L R. 1950 Mad 567 at 572 (P C).

the Inam Commissioner of the said Presidency is required to furnish inamholders with title deeds in respect of their inams prepared according to certain forms prescribed by the said Government, and whereas the terms of the title deeds so prepared appear in many cases to convey a more extensive right than was intended to be given or than could be legally given, and whereas it is apprehended that the terms of the title deeds may be so construed as to affect the rights and interests which other persons may have in lands from which the inams are derived or drawn, in cases where inamholders do not possess the proprietary right in the soil, but only the right of receiving the rent or tax payable to Government in respect of the inam lands as transferee of the Government, and it is therefore expedient to remove all doubts as to the true intent and meaning of the words used in the said title deeds : and whereas the words 'land' and 'lands' are used in Madras Act IV of 1862 and IV of 1866 in connection with inams in a sense not applicable to inams, and it is expedient to explain the true intent and meaning of such words in the said Acts , it is enacted as follows —

Nothing contained in any title deed heretofore issued to any inamholder shall be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the lands from which any inam is derived or drawn or to affect the interests of any person other than the inamholder named in the title deed , and nothing contained in Madras Act IV of 1862 or in Madras Act IV of 1866, shall be deemed to confer on any inamholder any right to land which he would not otherwise possess "

We may here refer to the two expressions commonly found in regard to land tenures in this State, 'melwaram' and 'kudiwaram'. Strictly, the Sovereign's right to collect a share of the produce from the cultivated land is known by the name melwaram and the share of the ryot or cultivator is known by the name kudiwaram. Under the ancient land system, the kudiwaram right or cultivator's right arose from first occupation of land. The grant of an inam may not and could not touch the cultivator's right in the land, namely, kudiwaram, except in cases where the grantor was also holding the cultivator's interest at the time of the grant . The cultivator will, therefore, be owner of the land and will also be the owner of the revenue of the land if it was assigned by the Government of the day While the revenue is not assigned to the owner of the soil himself and the revenue is granted to somebody other than the owner of the soil, the two interests in the land recognised will be held by two persons ; the person who receives rents and profits who is the owner of the land and the person who had received assignment of the revenue from the Government. Inam in such a case is of the revenue only. The Inam Settlement did not settle the question as to whether the inamdar was himself the owner of the land, and whether the inam comprised both the melwaram and kudiwaram or was only of the melwaram and this feature is brought out in Act VIII of 1869 set out above. The distinct interests in the land are set out thus in *Venkatanarasimha Naidu* v. *Dendamudi Kotayya*[1] :

" The interest in the land is divided into the two main heads of the kudiwaram interest and the melwaram interest, and the holder of the kudiwaram right, is really a co-owner with him The kudiwaram right originated in priority of effective occupation and beneficial use of the soil, and the claim of the Government and the assignees of Government was always in these parts, to a share in the produce raised by the ryots "

Their Lordships of the Judicial Committee in *Lakshmana* v *Venkateswaralu*[2], cite the above passage with approval and they further remarked that there is no presumption in law that the grant of an inam conveyed only the melwaram, that when the question of the respective rights of the parties in the land arises for decision, each case should be decided on its own merits without reference to any presumption in law regarding the existence of those rights in either of the parties, and that this principle will apply also to cases of minor inams.

In *Kondayya* v. *Rama Rao*[3], it is observed by the Supreme Court:

" Kudiwaram is a Tamil word, which signifies the cultivator's share in the produce of land as distinguished from the landlord's share received by him as rent, which is called 'melwaram' 'Kudiwaram' has acquired a secondary meaning , it means the cultivator's interest in the land, and 'melwaram' the landlord's interest in the land "

The relationship between melwaramdar and kudiwaramdar has generally been equated to co-ownership In Diwan Bhahadur Srinivasaraghava Ayyangar's book 'Progress of the Madras Presidency During the Last Forty Years of British Administration', it is stated at page 218 .

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1. (1897) 7 M L J. 251 : I L.R 20 Mad 299, 302.
2. L.R. 76 I A 202 : (1949) 2 M.L J 500 : I L R 1950 Mad. 567 (P C.).
3. A I R 1966 S.C. 681, 689.

"Ancient Hindu Law recognised only two beneficial interests in land, *viz*, (1) that of the Sovereign or his representatives, and (2) that of the cultivators holding the land either individually or as members of a joint family or joint village community, neither the Sovereign nor the cultivators had unlimited proprietary right or full ownership in the modern sense The Sovereign's right consisted in his power to collect a share of the produce of the cultivated lands known by the name of melwaram in the southern districts of the Presidency, and this melwaram is not rent in the strict signification of the term. The share of the ryots or cultivators is known by the name kudiwaram; and by ryots is to be understood cultivators who occupy, superintend and assist the labourer, and who are everywhere the farmers of the country, the creators and payers of the land revenue The ryot's right to land arises from mere occupation, and is not derived from the Sovereign in the manner in which the right of the English tenant under the Modern English law, derived from his landlord. The relation between the Government and the ryot may perhaps be described as one of co-partnership But is certainly not that of a landlord and tenant The ancient Hindu law books clearly establish this position."

It is for this reason obviously quit rent is not regarded as burden In *Secretary of State for India* v. *Raja Sobhonadri Appa Rao*,[1] it is stated.

"Now, in the first place, in their Lordships' opinion, it is a fallacy to speak of the imposition of quit rent in this cases a burden. The karnam in lieu of wages is granted the land, together with an assignment by State of the land revenue of the land subject to the payment of a quit rent, that is to say, he is not granted a total but only a partial exemption from the land revenue on the land Far from being a burden this assignment so limited is part of his remuneration."

It is apparent from the above discussion that the essence of an inam is that there should be a grant or gift, a favour by the grantor of land of melwaram also, or gift or giving up of melwaram in favour of the holder of the land, that is the kudiwaramdar. Or it may be an assignment of melwaram to a person not in occupation of the land. The grant or assignment of melwaram may be of the entirety of melwaram or. a share or fraction therein. As observed in *Zamindar of Ettayapuram* v. *Collector of Tirunelveli*[2],

'there is no doubt that in order to constitute a grant an inam, the mere use of the expression 'inam' or 'gift' is wholly inconclusive, unless along with that expression, we can find an indication that the grantee was to enjoy the land either totally free of rent or to have partial remission of the Government share of the revenue".

This imperative requirement of an inam has been affirmed recently by a Division Bench of this Court in *Vedaranyeswaraswami Devasthanam* v. *State of Madras*[3] where the constitutionality of the Madras Inam (Assessment) Act, 1956, came up for consideration and was upheld. Ramachandra Iyer, C J., who delivered the judgment after a detailed consideration of the law relating to inams observed ·

"The inam grants were of various extents Sometimes they comprised of whole willages. Sometimes they were only of parts of villages The inams themselves were of different species Some comprised both of kudiwaram as well as the melwaram interest in the land, others of the melwaram due to the State alone But the distinguishing feature of an inam is that it is always accompanied by the grant or remission of the whole or part of the revenue Indeed there will be no inam if there is no remission of revenue either in whole or in part, and a mere grant of land subject to payment of full assessment has never been regarded as an inam Thus, an inam grant may consist of one or the other of the following (i) of the melwaram alone of an entire village, (ii) of both the melwaram and the kudiwaram in an entire village, (iii) of the melwaram alone in a part of a village where such village is part of a zamindari or a larger inam or a ryotwari area, and (iv) of the melwaram and kudiwaram in part of a village where such village is part of a zamindari, larger inam or of a ryotwari area. The last two categories of inams are known as minor inams"

The Madras Inams (Assessment) Act, 1956, the effect of which it is said, is to existinguish the inams, purports to be an Act for the levy of full assessment on certain inam lands in the State of Madras. It received the assent of the President on the 19th February, 1957, and was gazetted on the 27th of February, 1957. The Act defines 'inam' as 'inam land' and as including an assignment of land revenue on inam land Inam land is defined as meaning any land the grant of which in inam had been made, confirmed or recognised by the Government and including any inam constituting an estate under the Estates Lands Act. But the definition of Inam lands excludes (i) any estate to which the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948), apply or applied; (ii) any ryoti land, that is to say, any cultivable land in an estate

1. L.R. 64 I A. 227. (1937) 2 M.L J 240: I L.R. (1937) Mad. 862, 876
2. (1962) 1 M.L J 20 at 31.
3. (1965) 1 M L J 1: I L.R (1964) (1) Mad 212, 217.

held by a person other than the landholder ; and (iii) any land granted by a landholder on service tenure either free of rent or on favourable rates of rent if granted before the passing of the Estates Land Act or free of rent if granted after that date, so long as the service tenure subsists and communal lands, waste lands and forests *etc*, as set out in clauses (iv), (v) and (vi) of section 2 (*d*) of the Act. Section 3 (1) of the Act provides for the levy of full assessment on any inam land in a ryotwari village at the rate of assessment set out in the settlement notification for lands of a similar description and with similar advantage in the same village, and if there are no such lands, in the nearest ryotwari village where such similar lands exist On any other inam land it is made lawful for the State Government to levy full assessment at the rate of assessment set out in the settlement notification for the lands of similar description and with similar advantages in the nearest ryotwari village where conditions are generally similar to those obtaining in the village in which the inam land is situated. There is a proviso to section 3 (1) that in the case of an inam granted on service tenure which is proved to consist of an assignment of land revenue only no assessment under the sub-section shall be leviable, and the inamdar shall be liable to pay only the quit rent, jodi, kattubadi or other amounts of a like nature, if any, which he has been paying before the commencement of that Act In the case of whole inam villages which became estates under the 1936 amendment the levy of full assessment is in addition to any quit rent, jodi, *etc*, payable to the State by the landholder In the case of other inams, the quit rent, jodi *etc*, will be deducted from the full assessment contemplated under the Act. The Act makes one thing clear that it empowers the State Government to levy full assessment on certain inam lands. The question for consideration is what is the effect of such levy and whether in such cases the inam gets extinguished and the property ceases to be an inam *Prima facie* it may be said that where the inam grant is only of the assessment, whether whole or partial, if full assessment is levied, the inam gets extinguished ; it could no more be said to retain its essential inam character It would tantamount in effect to resumption of inam. In *Idubily Siyyadi Garu* v. *Visweswara Nissanka*[1], Spencer and Coutts-Trotter, JJ., observed :

> "Resumption means no more than a taking back of that which was once given, and, therefore, the plaintiffs cannot succeed in evicting the defendants unless they are able to show that what was originally granted was not merely a slice of the melwaram or landlord's share of the produce but the land itself "

The effect of levy of full assessment on inams under Madras Act XL of 1956 also was discussed by this Court in *Vedaranyeswaraswami Devasthanam* v. *State of Madras*[2]. Extreme contentions were put forward in the said case. On behalf of the State it was contended that grantee of an inam, whether it be of melwaram or of melwaram and kudiwaram, is the owner of the land, and that an inam was a grant of the land, and the imposition of assessment a tax. For the inamdars it was contended that the State has no ownership of the soil of the land, its only right being to receive Rajahbogam from the occupier, that is, the owner of the kudiwaram. On a consideration of the case-law and a review of the history of inams, it is observed by the learned Chief Justice at page 223 :

> "It follows that an inam by Sovereign authority need not necessarily consist merely of a transfer of its right to revenue but it may also include the grant of the soil, the extent of the grant depending in each case on the construction of the terms thereof."

Adverting to the incidence of assessment under the Inam Assessment Act, it is stated :

> "(i) Where the grant is of the entire village whether such grant is of the melwaram alone or of the melwaram and kudiwaram in such a case the inamdar will, in addition to his right to collect the melwaram from the ryots, be the owner of all uncultivated and waste lands comprised within the ambit of the grant The levy of ryotwari assessment, while it may diminish his net income from the estates, might not affect his ownership of the uncultivated areas in the village or of mines, *etc*, if included in the grant.
>
> (ii) Where, the grant is of both the warams in a part of a village, the provisions of the Madras Estates Land Act would not apply in such a case but the right of the inamdar to collect rents from his tenant will be subject to the tenancy legislations existing for the time being, like the Cultivating Ten-

1 30 I C 416, 417.
2 (1965) 1 M L J 1 I L R 1964 1 Mad. 212

ants Protection Act, (XXV of 1955) and the Fair Rent Act XXIV of 1956 It may be that in such a case the imposition of ryotwari assessment does not take away all the income that the minor inamdar might get from the tenants but there can be no doubt that a substantial part of the income must be lost to him by reason of the imposition of the assessment under the impugned legislation

(iii) Where the grant consists of land revenue alone over a part of a village, what the grantee obtains is nothing more than his assignor's right to collect the assessment, in such a case the incidence of the tax will practically take away all or most of what the inamdar gets from his ryots "

The minor inam contemplated above under the third head obviously refers to a grantee of land revenue over specified parcels of land not his own as there is reference to other ryots on the land and it is further observed in the judgment.

" In regard to ryotwari lands and the lands in the abolished estates, the assessee owns the land This can also be said in the case of a minor inamdar who has got both the melwaram and kudiwaram interest in the land But a minor inamdar who is only an assignee of the land revenue is not in possession of the land His case cannot, therefore, be treated as similar to that of the other owners of land, the imposition of full ryotwari assessment in his case would practically take away all that has been granted to him In their case there was need for a special and less harsh treatment at the hands of the Legislature But unfortunately no provision has been made in the statute to treat them differently from others "

For the matter now under consideration we have to make a further categorisation. In the case of grant of part of a village, the part may be a specified fraction of the village, or a specified number of shares in a village, or it may be defined specified parcels of land or a block of land in a village. That is the grant may be what is defined as ' part village inam estate ', in the Inam Estates Act, or a grant covered by the Minor Inams Act The dichotomy in the concept of beneficial interest in the land between kudiwaram and melwaram can necessarily be with reference to the cultivated lands in a village and the grantee's right in the land itself may be open to challenge in the absence of ownership of the land in the grantor only in respect of cultivated lands. The characteristic of an Indian village is described thus in Sundararaja Iyengar's Land Tenures, IInd Edition, at page 32 :

" The central site consisting of the houses of the community, surrounded first by the arable mark consisting of cultivated lands, and then by the common marks consisting of uncultivated lands, is particularly true of the South Indian Village of the plains While the village communities of the west refrained from increasing the arable mark and valued the common mark chiefly for pasture, the common mark in India was always treated as being liable to be merged in the arable mark Thus waste lands and virgin forests within the boundaries of a village, though not coming under the arable mark had a tendency to develop into it at some time or other The Hindu system of assessment with its share of the produce was not likely to impede such development, and an extended cultivation increased the revenue to the State "

Whether the grant is of the melwaram or melwaram and kudiwaram, the grantee of a fractional share of a whole village would be the owner of a share also in all uncultivated and waste lands comprised within the ambit of the grant Even as in the case of grantee of a whole village, the levy of ryotwari assessment, while it may diminish the net income of the holder of a share in the village, it might not affect his share of the uncultivated areas in the village, mines, forests, etc, if they are included in the grant The incidence of the assessment with reference to the first category, in *Vedaranyeswaraswami Devasthanam case*[1], that is, where the grant is of the entire village, whether such grant is of the melwaram alone or melwaram and kudiwaram noticed by the learned Chief Justice, will equally apply to the case of the grantee of a fractional share in the whole village, that is a ' part village inam estate ' holder as defined in the Inam Estates Act But the third classification for the purpose of the incidence of the assessment made by the learned Chief Justice will apply to other minor inams under the Minor Inams Act, where the grant is of the melwaram alone even where the grantee is already the owner of the kudiwaram If the grant is of both the melwaram and kudiwaram, then though the effect of the Inam Assessment Act may be substantially to affect the grantee's income, it cannot be said that there is an extinguishment or taking away all that has been granted There will still be some part of the favour left, in the kudiwaram Equally even if the grant be of melwaram alone in a village, whether it be a whole village or a

1. (1965) 1 M.L.J. 1 : I.L.R. (1964) 1 Mad. 212.

'part village inam estate', it cannot be said at least as a general proposition that the grantee gets nothing more than his assignor's right to collect assessment. The miscellaneous sources of income either in whole or in shares or a fraction will be there, the possibility of having extended cultivation is there, and a vestige of the inam will still be left after full assessment The Legislature in defining a 'part village inam estate' obviously had in mind cases where the villages were held in shares by several grantees Cases have come up in Courts where originally the entire village might have been granted as inam but subsequently the grantor might have resumed a half or 1/3 rd or some such fraction of the village and the inam grant was confirmed in respect of the remaining share One of the several grantees of the village might have abandoned his share in the village granted as inam and his share resumed by the grantor. There may be a fresh grant of the share thus resumed and ultimately the village got confirmed on several grantees in shares. There can, however be little doubt that when the grant is, of the land revenue only over specific revenue fields or parcels of land in a village that is of a grant that would fall under Madras Act XXX of 1963 as a minor inams, then whether the grantee is already owner of the kudiwaram or not, the effect of full assessment as provided under the Madras Inams (Assessment) Act would be to extinguish the grant

In *Vedaranyeswaraswami Devasthanam* v. *State of Madras*[1], it is observed :

"Mr. Vedantachari then contended that at any rate in regard to the minor inams which consist of the melwaram alone, the levy of full ryotwari assessment, under section 3 of the Act (The Madras Inams (Assessment) Act) should be regarded as an unreasonable restriction on the inamdars' right to enjoy his property and that the legislation should be struck down as contravening Article 19 (1) (*f*) We have already indicated our view that while it cannot be said that the assessment levied on inams which consist of whole villages or of both the warams in the land is unreasonable the same cannot be said with respect to an inam of the melwaram alone in part of a village What is granted in such a case is the Government's share of the revenue and what is sought to be levied under section 3 is practically the same There is therefore considerable force in the contention advanced by the learned Counsel The pith and substance rule referred to above may not apply in such a case as the substance itself will be acquisition of property"

With respect we are in entire agreement with the view thus expressed that in the case of Minor Inams where the grant is of the melwaram alone the effect of levy under the Inam Assessment Act would be practically to take away the same. In our view, with reference to any particular grant, if as a result of the assessment under the Inam Assessment Act there is nothing of the gift, benefit or favour left, there will be no Inam for the Minor Inams Act to act upon. It can be said that there is no Inam to vest in the State under section 3 (*b*) of the Act. The inam is of the land revenue only and the grant had been taken away by the levy of full assessment. In the decision referred to above no relief could be granted to the Inamdars striking down the Act even so far as the Minor Inams were concerned, as that Act was protected by the assent of the President under Article 31-A and it was the validity of the assessment under the Act that was then in question. Now we are concerned with the effect of the assessment validly made, on the subsequent character of the property.

On behalf of the State reliance was placed on the aforesaid decision, *Vedaranyeswaraswami Devasthanam* v *State of Madras*[1], and the decision in *Sesha Sarma* v. *State of A.P.*[2] The former decision far from being of any help to the State as pointed out above in fact supports the petitioners. The latter case wherein the validity of the Andhra Inams (Assessment) Act came up for consideration cannot also be of any assistance to the State as in that case grants which were of land revenue alone were excluded from the operation of the Act Satyanarayana Raju, J , (as he then was) delivering the judgment of the Division Bench observed :

"It is then argued that the effect of levying full assessment is to convert the petitioner's Inam-land to ryotwari and has the effect of resumption of the Inam We cannot accede to this contention. Where the grant is of land revenue alone, resumption has no effect on land and interference therewith is not at all intended The only effect of resumption is to impose full assessment on land which was till then revenue free, either wholly or partially, and classify it under the head of ryotwari

1. (1965) 1 M L J. 1 I L R (1964) 1 Mad 212, 231, 232.
2 A I R. 1960 Andh. Pra. 461 at 464.

The Act does not infringe any right to property and there has been no cancellation of the grant. There is no putting an end to the grant and the Act specifically excludes cases where the grant was of the land revenue alone The second proviso to section 3 saves all grant of land revenues and makes the Act applicable only to cases where the grant was of the land "

But the applicability of the impugned Acts to the Inams in question cannot be conveniently investigated in the present writ proceedings The question will have to be determined with reference to the terms of the grants; the extent of the grant has to be ascertained by reference to the relevant materials. Section 5 of Madras Act XXXI of 1963 makes special provision for determination of the question whether any non-ryotwari area is or is not an 'existing inam estate' or 'part village inam estate' or a minor inam or whole inam village in Pudukkottai It is stated at the Bar that in most of the cases now before us the parties have applied under the provisions of the said Act for determination of the character of the inams respectively held by them It is needless to point out that the Tribunal constituted under the Act will be entitled to decide that a particular property is neither an 'existing inam estate' nor a 'part village inam estate' nor, a 'minor inam', nor a whole inam village in Pudukkottai and so completely out of the coverage of Acts XXVI and XXX of 1963 We also make it clear that the disposal of these Writ Petitions now does not preclude the inamdars from agitating the question that a particular property is not an inam at all and does not fall under any of the aforesaid four categories or falls under one or other of the categories as may be urged for the inamdars.

An argument was faintly put forward that the impugned enactments are contrary to the Crown (Government) Grants Act of 1895. We fail to see how that Act can affect the validity of these enactments. The provisions of the Crown (Government) Grants Act are intended only to give validity to conditions imposed by the Government in respect of Crown lands even though the conditions might not be in conformity with the law of the land like the rule against perpetuity, accumulation etc. The Act does not preclude the Government from altering modifying or from extinguishing the grants made whose validity could be sustained under the Act.

In the result, all the Writ Petitions except Writ Petitions Nos. 1958 and 1812 of 1965 separately dealt with on merits, are dismissed. There will be no order as to costs

V.K. ——— *All the petitions except W.P.Nos.* 1958 *and* 1812 *of* 1965 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P.S KAILASAM

K T.M. Muthuswamy Ambalagarar .. *Petitioner**

v.

The Board of Revenue (L R), Madras, represented by the Commissioner of Land Revenue and Food Production, and others .. *Respondents.*

Board Standing Order No 156-*A* (1)—*Appointment of Village Headman—Revisional powers of Board of Revenue—Extent of*

Constitution of India (1950), *Article* 226—*Scope of interference under.*

When a revision is filed to the Board of Revenue under the Board Standing Order No 156-A against the appointment of a candidate as a Village Headman, the Board of Revenue can interfere with the order only if it is vitiated by illegality, material irregularity, obvious error resulting in miscarriage of justice or want of jurisdiction It is not open to the Board to go into the merits and make a comparative estimate of the qualifications of the rival candidates and to decide in favour of the candidate who according to it was the best qualified Such an order would be without jurisdiction, liable to be quashed under Article 226 of the Constitution of India

* W P. No. 4636 of 1965. 21st July, 1966.

Semble : The High Court has ample power under Article 226 of the Constitution of India to interfere with an order of an inferior tribunal on the ground of lack of jurisdiction, even if the objections to its jurisdiction was not taken before that tribunal

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari*, calling for the records of the 1st respondent in its B P Rt No 2683 (A), dated 4th May, 1964, and of the 2nd respondent in its Memorandum No 43358-V-2/64-12, dated 26th November, 1965, and quash the said orders therein

K Rajah Iyer for *V. Srinivasan*, for Petitioner.

K S Bakthavatsalu, for the Additional Government Pleader, for Respondents Nos. 1 and 2.

V P Raman and *N R Chandran*, for 3rd Respondent.

The Court made the following

ORDER —This petition is filed for the issue of a writ of *certiorari* for calling for the records of the Board of Revenue in B P Rt No 2684 (A), dated 4th May, 1964, and that of the State of Madras in Memorandum No 43358-V-2/64-12 dated 26th November, 1965, and for quashing the same The permanent Village Headman of Kaduvetti Village in Musiri Taluk, one Krishna Pillai, died on 20th August, 1958. Before his death, the 3rd respondent was acting as the temporary Village Headman during the leave of Krishna Pillai After the death of Krishna Pillai, the 3rd respondent, continued to function as the Village Headman The vacancy in the office of the Village Headman was notified and applications were received The petitioner, the 3rd respondent and one Thirunavukkarasu applied The Revenue Divisional Officer, Musiri, selected the petitioner for the post on 8th March, 1959 There were appeals by the aggrieved candidates to the Collector of Tiruchirapalli, and the Collector remanded the case for fresh consideration. Pending these proceedings the service of the 3rd respondent, who was acting as the Village Headman was terminated by the order of the Revenue Divisional Officer on 31st December, 1960, on the ground that certain acts of misappropriation were committed by him. The Revenue Divisional Officer after remand considered the claims of the three applicants, and on 31st December, 1960, selected the petitioner The 3rd respondent and Thirunavukkarasu filed appeals to the District Revenue Officer. The District Revenue Officer dismissed the two appeals and confirmed the appointment of the petitioner as the permanent Headman on 30th June, 1961. The appeal filed by the 3rd respondent against the order of the Revenue Divisional Officer terminating his services as acting Village Headman was also dismissed The 3rd respondent and Thirunavukkarasu filed revision petitions to the Board of Revenue against the order of the District Revenue Officer confirming the appointment of the petitioner as Village Headman. The 3rd respondent also filed a petition against the order of the District Revenue Officer, confirming his termination The Board on 28th May, 1962 considered both the revision petitions filed by the 3rd respondent and Thirunavukkarasu and also the petition filed by the 3rd respondent against the order of the District Revenue Officer, confirming his termination and passed a common order on 28th May, 1962 The contents of the order will be referred to in detail later The charges against the 3rd respondent were again enquired into, and the Revenue Divisional Officer found that, so far as the first charge against the 3rd respondent was concerned, which related to collection of Rs 2 and not bringing it to account, it had been made out and the 3rd respondent was let off with a warning The other charges against the 3rd respondent were dropped After the conclusion of this enquiry, the 3rd respondent filed a petition on 19th February, 1964, before the Board requesting it to take up the revision petitions filed by him against the order appointing the petitioner as the permanent Village Headman The Board heard the petitions and passed orders appointing the 3rd respondent as the permanent Headman on 4th May, 1964 Against the said order the petitioner filed a revision petition to the Government and the Government rejected the petition by its order dated 26th November, 1965 The present petition is filed for the issue of a writ of *certiorari* for quashing the order of the Board of Revenue in B P. Rt. No.

2683 (A), dated 4th May, 1964, and that of the Government in Memo. No. 43358-V-2 dated 26th November, 1965

Mr. K Rajah Aiyar, learned Counsel for the petitioner submitted that the order of the Board of Revenue was without jurisdiction and was liable to be quashed on the ground that the revision petition by the 3rd respondent against the appointment of the petitioner as a permanent Headman by the District Revenue Officer was disposed of by the Board of Revenue on 28th May, 1962, and therefore it had no power to review the order again on 4th May, 1964. It was contended that in any event the power of the Board is prescribed under B S.O. No 156 (1), clause (*iii*) of the Board Standing Orders and it acted in excess of its jurisdiction by going into the merits. On behalf of the 3rd respondent Mr V P Raman, learned Counsel submitted that the order fell within the scope of B S O. No. 156-A (1) and that in any event the petitioner should not be allowed to canvass the jurisdiction of the Board of Revenue, as he did not take the objection as to want of jurisdiction and submitted himself to a decision on the facts of the case.

In disposing of the two revision petitions of the 3rd respondent and Thirunavukkarasu against the order of the appointment of the petitioner as the permanent Headman by the District Revenue Officer, and the revision petition filed by the 3rd respondent against the order terminating his temporary appointment, the Board of Revenue passed a common order on 28th May, 1962. In paragraph 2, the Board dealt with the termination of the services of the 3rd respondent and found that proper procedure had not been followed It set aside the orders of the District Revenue Officer and the Revenue Divisional Officer and directed a full and proper enquiry regarding the removal of the 3rd respondent In paragraph 4 the Board directed that the 3rd respondent would remain out of office during the fresh proceedings of the case, that he would not be permitted to rejoin and that he would be given a chance to vindicate his grievance and that if he succeeded he would be eligible for being considered for future appointment in temporary or permanent vacancies It will be seen that the Board has not dealt with the revision petitions against the appointment of the petitioner as the permanent Village Headman. Mr. Rajah Aiyar, therefore, justifiably complained that there was nothing to indicate that the matter was kept pending He submitted that an indication that the revision petitions were also disposed of would be seen from the fact that a copy of the order of the Board was sent to the petitioner also Though there is nothing to indicate that the consideration of the two revision petitions against the appointment were deferred, as the petitions had not been disposed of, I am unable to say that the Board of Revenue was in error in taking the two revision petitions for consideration when the 3rd respondent filed a petition after the disposal of the charges against him.

In disposing of the revision petitions by the 3rd respondent and Thirunavukkarasu the Board in its order dated 4th May, 1964, considered the merits and arrived at the conclusion that the 3rd respondent had to be preferred. The Board holding that the 3rd respondent had sufficient property, qualifications and was a young man, fully qualified, found him more suitable It also held that so far as the charges against the 3rd respondent were concerned, it could not disqualify him from pressing his candidature for the office.

The power of the Board in dealing with revision against the order of the District Revenue Officer is specified in B.S.O. No 156-A. The Government in respect of an order passed by the Board of Revenue and the Board of Revenue in respect of an order passed by any authority subordinate to it may either *suo motu* or on the application of an aggrieved party and for reasons to be recorded in writing, annul, modify, reverse or remit for reconsideration such order on any of the grounds mentioned in clauses (*i*) to (*iv*) of B S.O. No. 156-A. Clauses (*ii*) to (*iv*) are not applicable to this case and therefore we are concerned only with clause (*i*). The Government and the Board can interfere if the order is vitiated by illegality, material irregularity, obvious error resulting in miscarriage of justice or want of jurisdiction. Obviously none of the conditions is available in this case, though Mr. V.P. Raman, learned Counsel, submitted that the Revenue Divisional Officer in his order dated 31st

December, 1960 erroneously referred to the fact of the removal of the 3rd respondent from the post of acting Headman What is stated in the order of the Revenue Divisional Officer is correct, for on that date the 3rd respondent had been removed. The fact that subsequently the 3rd respondent was found guilty of one charge and let off with a warning would not make the order of the Revenue Divisional Officer illegal or one which is obviously erroneous resulting in miscarriage of justice A Bench of this Court in *Rathnaswami Padayachi* v. *Mani Pillai*[1], dealing wih the powers of the Board of Revenue under B S O No. 156-A held that the Board in passing the orders under B S O No. 156-A was acting judicially and as such its orders were subject to the jurisdiction of the High Court under Article 226 of the Constitution. The Court observed at page 203 :

" It is clear therefore that the Government travelled beyond the limits of their jurisdiction in holding that on the merits the appellant was better qualified for the office than the respondent We entirely agree with the learned Judge, Balakrishna Ayyar, J , that it was not open to the Government to make a comparative estimate of the qualifications of the candidates and to decide in favour of the candidate, who, according to them, was the best qualified "

This statement of law is applicable with equal force to the powers of the Board of Revenue The order of the Board of Revenue suffers from want of jurisdiction

Mr. V P Raman, learned Counsel for the 3rd respondent submitted that, even if the order of the Board of Revenue was without jurisdiction, this Court will not interfere by means of a writ of *certiorari*, as the petitioner did not object to the jurisdiction of the Board in taking into consideration the comparative merits of the candidates and deciding the case on merits Learned Counsel placed considerable reliance on a decision of the Full Bench in *Lakshmanan Chettiar* v *Commissioner of Corporation of Madras*[2]. In that case a writ was applied for on the ground that the Commissioner of Corporation of Madras and the Chief Judge of the Court of Small Causes, Madras, acted without jurisdiction, in that when they were only empowered to inquire into disabilities appearing on the face of the nomination paper, they in fact travelled outside that jurisdiction and went into a matter of substance which was arguable only on grounds not appearing on the face of the nomination paper. Upholding the preliminary objection to the availability of a writ on the ground that the petitioner by his conduct in taking the chance of a pronouncement in his favour on the merits had forfeited his rights, the Full Bench held that when a petitioner armed with a point either of law or of fact which would oust the jurisdiction of the lower Court had elected to argue the case on merits before that Court, he could not be allowed afterwards to seek to repudiate that jurisdiction by filing a writ petition The Full Bench after referring to various English decisions summed up the position thus :

" The English authorities which were cited *prima facie* establish the proposition that in such circumstances the applicant cannot obtain a writ of *certiorari ex debito justitiae* but the Court is exercising a purely discretionary power "

This decision was cited and approved by the Supreme Court in *Messrs Pannalal Binjraj* v *Union of India*[3]. The Full Bench has not ruled that when an objection to the jurisdiction has not been taken before the lower Court, the High Court has no power to interfere. According to the practice of the English Courts the petitioner will not as of right be entitled to a writ in the circumstances. In fact the Full Bench understood the English cases to have laid down that in such circumstances an applicant could not obtain a writ of *certiorari ex debito justitiae*. This statement would mean that the Court is powerless and that it cannot issue a writ even if it is convinced that a writ should issue in spite of the fact that an objection to the jurisdiction was not taken before the lower tribunal If that were so, it will be opposed to the powers granted to the High Court under Article 226 of the Constitution of India. The decision in *Lakshmanan Chettiar* v. *Commissioner of Corporation of Madras*[2] was rendered before the Constitution came into effect In *Basappa* v. *Nagappa*[4],

1 (1959) 1 M.L.J. 201. 397 at 412.
2. 51 M.L.J. 742: I L.R. 50 Mad. 130. (F.B.)
3. (1957) S.C.R. 233 : A.I.R. 1957 S.C.
4. (1954) S.C.J. 695: (1955) I S.C.R. 250.

Mukherjea, J., at page 256 dealing with the powers of the High Court under Article 226 of the Constitution stated the position thus :

"The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of *habeas corpus, mandamus, quo warranto, prohibition* and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges "

This view was again affirmed by the Supreme Court in *Kochunni* v. *State of Madras*[1].

Before the Board of Revenue the petitioner questioned its jurisdiction on the ground that by its previous order dated 28th May, 1962, the Board had disposed of the revision petitions against the order of appointment of the petitioner and therefore the Board had no jurisdiction Having questioned its jurisdiction the petitioner also argued on merits. It would not follow that the petitioner acquiesced in the jurisdiction of the Board and was willing to take a decision on merits. Even so, as the jurisdiction of the Board was challenged and as the order passed on merits is clearly beyond the powers of the Board under B S O. No 156-A, the petitioner cannot be said to have forfeited his right to approach this Court. Taking all the circumstances into consideration I am satisfied that this is a fit case in which a writ should be issued. The orders of the Board of Revenue and the Government are quashed, and the Board of Revenue is directed to take up the matter on its file and dispose of of according to law There will be no order as to costs

V K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K S. VENKATARAMAN.

M. N. Subramania Mudaliar and others . *Petitioners**

v.

Shanmugham Chettiar and others .. *Respondents.*

Compromise decree—Time essence of the contract—Extension of time—No jurisdiction on the Court.

Under the terms of the compromise decree the defendants were given four years' time for delivering possession of the property to the plaintiff After the period of four years was over the defendants applied for extension of time

Held, in a compromise decree where time is the essence of the decree for delivering possession of the property, the Court has no jurisdiction to extend the time

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to extend by two more years, the time granted under the compromise decree in S A. No. 557 of 1960 preferred to the High Court against the decree of the Additional District Court, Salem in A.S No 32 of 1959 (O S No. 1033 of 1956 on the file of the District Munsif's Court, Sankaridrug at Salem).

T. K Subramania Pillai, for Petitioner.

D. Ramaswamy Iyengar, for Respondents.

The Court made the following

ORDER —In this case by the compromise decree passed on 27th September, 1962 defendants 2 to 5 in O S. No. 1033 of 1956 were directed to remove the asbestos shed and deliver possession of the property to the appellant (plaintiffs in O.S No. 1033 of 1956) on or before 31st August, 1966 and in default the appellants shall be entitled straightaway to recover possession of the property from the defendants 2 to 5 in the

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1 (1959) S C J 858 (1959) 2 An W R. (S C) 725 70 (1959) 2 M L J (S C) 70 A.I R 1959 S C.

*C M P. No. 8793 of 1966. 24th August, 1966

said suit by executing the decree By means of this petition the said defendants 2 to 5 pray for further extension of time for removal of the shed and delivery of possession of the premises to the plaintiffs They say that though they expected to get possession of an adjoining vacant site within the time stipulated, it has not been possible for them to do so It is urged on their behalf by Sri T K Subramania Pillai, the learned Counsel, that they have invested about Rs. 3 lakhs on the property, and that it will cause undue hardship to them if they are directed to remove the shed and deliver possession to the plaintiffs before 31st August, 1966.

This application is stoutly opposed by plaintiff-respondents. Their learned Counsel Sri D Ramaswami Iyengar urges that the decree is a compromise decree, that time was of the essence of the compromise, and that this Court has no jurisdiction to extend the time fixed in the compromise He cites the decision in *Bct Anna Nadar* v *M Srinivasan*[1], which itself follows a decision of the Supreme Court That decision points out that in a compromise decree where time is of the essence of the contract, the Court has no jurisdiction to extend the time Sri T K Subramania Pillai has naturally not been able to cite any decision to the contrary But he urged that the clause fixing the time till 31st July, 1966 is a penal clause meant to be *in terrorem* and that I have jurisdiction to relieve the defendants against that clause. I do not see any reason to hold that the clause is *in terrorem* The defendants were given four years time to remove the shed which is more than what is usually given in such compromise decrees Therefore they had ample time and there is nothing to show that it was intended to be by way of *terrorem* It is clear that the party, the defendants, willingly agreed to deliver possession before 31st August, 1966. Accordingly I have no power to extend the time and in this view of the matter, I dismiss the petition but without costs

Sri T K Subramania Pillai applies for leave to appeal But since the position seems to be well-settled, it is not possible to grant leave

V S —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Chief Justice*

A R. Lakshmana Chettiar . *Petitioner**

v.

Vadivelu Ambalam . *Respondent*

Civil Procedure Code (V of 1908), Order 16, rule 19 and Order 26, rule 4—Witness residing beyond the limits fixed under Order 16, rule 19—Commission for examination of witness—Discretion—Suit on assigned promissory note—Defendant disputing consideration and factum of assignment for payment—Commission to examine assignor residing beyond the limit fixed under Order 16, rule 19—Commission to be issued

Where a witness is not under the control of the party asking for the commission and he resides beyond the limits fixed under Order 16, rule 19 of the Code, it would be a proper exercise of judicial discretion to issue the commission, if the evidence of that witness is essential for the party seeking to have him examined.

Where the witness is the assignor of the negotiable instrument and it seems reasonable for the defendant to contend that his evidence is essential as the defendant disputes the consideration under the document and the factum of assignment for payment made by the holder, the commission can be issued to examine the assignor

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Devakottai dated 19th August, 1964 and made in I A No 600 of 1964 in O S No 482 of 1963

K Chandaramouli, for Petitioner

Respondent not appearing in person or by Advocate

The Court made the following

ORDER —In this case, in holding that he need not grant the application under Order 26, rule 4, Civil Procedure Code, for the issue of commission for the exami-

1 (1962) 1 M L J 418

*C R P No 1844 of 1964. 2nd September, 1966.

nation of a witness, residing outside the limits fixed by Order 16, rule 19, Civil Procedure Code, the learned District Munsif appears to have missed the point of the judicial discretion involved. As Wallace, J., pointed out in *Jagannatha* v *Saratham-bal*[1], and there is nothing in the later decisions of this Court to contravene this dictum, where a witness is not under the control of the party asking for the commission, and he resides beyond the limit fixed under Order 16, rule 19, Civil Procedure Code, it would be a proper exercise of judicial discretion to issue the commission The remarks of Jagadisan, J., in *Ramakrishna Kulyant Rai* v *Hardcastle & Co* [2], relate both to a party as well as a witness, and the learned Judge does emphasise that the discretion vested in a Court must be exercised in a judicial manner Certainly, with regard to a party, and this appears to be corroborated by the observations in *Muhammad Zackaria* v. *Abdul Karim Rowther*[3], it would be an unusual privilege to exempt the party from attendance in Court, merely because he was living beyond the limits of jurisdiction, and permitting him to be examined on commission. Very vital factors in the appreciation of evidence, such as the demeanour of the party under cross-examination, etc., may have to be assessed, and a party ought not to be lightly permitted to escape such scrutiny, by the plea that the party is residing beyond the jurisdictin specified in Order 16, rule 19, Civil Procedure Code and is hence entitled to be examined on commission

But, obviously, the case is very different, in the matter of witness not under the control of the party seeking to summon him, who is resident beyond the specified limit. Particularly if the evidence of that witness is essential for the party seeking to have him examined, and he is not under the control of the party it is very difficult to see how he could be examined otherwise than on commission, if he is resident beyond the specified limit Clearly, the Court cannot compel his attendance, and this is beyond dispute. It would of course be a different matter, if the Court is satisfied that the evidence is not essential, or that this is merely a device to vexatiously protract the proceedings, or the relevance of any evidence that could be given by such a witness is very doubtful. In the present case, the witness is an assignor of the negotiable instrument, and it seems reasonable for the defendant to contend that his evidence is essential, as the defendant disputes the consideration under the document, and the factum of assignment for payment made by the holder-in-due-course Of course if the witness is willing to attend Court in response to a summons, without being compelled to do so, this mode may be tried in the first instance, by summoning him. But if this fails, since the witness cannot be compelled to attend Court and is not under the control of the defendant (revision-petitioner), it seems reasonable to have him examined on commission The order of the learned District Munsif is set aside, and he is directed to dispose of the application in the light of these principles. This revision petition is allowed. No costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR JUSTICE T. VENKATADRI.

Messrs. V. G. Panneerdas & Co. by Partner, V G. Panneerdas .. *Petitioner**

v.

The Corporation of Madras, Madras, represented by its Commissioner and another . *Respondents.*

Madras City Municipal Corporation Act (IV of 1919), section 349 (28)—By-law made under prohibiting advertisements in certain places—Validity.

The by-law made under section 349 (28) of the Madras City Municipal Corporation Act (IV of 1919) prohibiting the erection or exhibition of all or any class of advertisements in any street or any place of public resort is valid It is a notorious fact that persons who carry on advertisement business or indulge in advertisement exercise their rights vulgarly by exhibiting them on every conceivable place

1. 44 M.L.J. 202: A I R 1923 Mad 321
2. (1962) 2 M L J 490
3. (1956) 2 M L J 371

* W P. No 1097 of 1963 12th September, 1966

such as lanes, roads, residential houses, bridges, hospitals and religious places and thereby make the city ugly The Corporation must certainly have the power of safeguarding the public from dangerous, obstructive or ugly advertisements It is therefore a reasonable restriction It does not amount to a total prohibition or prevention of advertisements nor is there any discrimination involved in it.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *prohibition* prohibiting the first respondent herein, namely, the Corporation, Corporation of Madras, from interfering with the display of the petitioner's advertisements at Guindy Railway Overbridge and the Railway Overbridge at Gandhi-Irwin Road and at the Sir T Muthuswamy Iyer Railway Overbridge near Fort Railway Station

S K L Ratan, for Petitioner

T. Chengalvarayan, for 1st Respondent

M. M. Ismail, for 2nd Respondent.

The Court made the following

ORDER.—The Corporation of Madras, claiming to act under the statutory powers under section 349, clause (28) of the Madras City Municipal Corporation Act, made the following by-law:

"Prohibit the erection, exhibition, fixation, retention or display of all or any class of advertisements in any street, road, or public park or part thereof or in any place of public resort, and regulate the erection, exhibition, fixation, retention or display of advertisements in any manner in non-prohibited areas"

Acting under this by-law, the Corporation issued a notification prohibiting advertisements on side walls embankments and railing of viaducts, overbridges, culverts and approaches thereto

Learned Counsel for the petitioner contends that this by-law is bad because it is unreasonable Clause (28) of section 349 relates to prohibition and regulation of advertisements But the power taken under the by-law prohibits the erection or exhibition of *all or any* class of advertisements in *any* street or *any* place of public resort. Such a power is an unrestricted and absolute power. Such a power is likely to be abused Such a by-law is likely to be a nuisance and an annoyance to the public especially to a particular class or community who carry on business Such a by-law, under the guise of regulating advertisements, arbitrarily interferes with private business and imposes unreasonable and unnecessary restrictive regulations upon lawful occupation Courts have power or jurisdiction to declare such a by-law as *ultra vires*, and there is nothing in the City Municipal Corporation Act which excludes that jurisdiction

Therefore the question reserved for consideration of this Court is whether the by-law in question is valid.

In *Bailey* v *Williamson*[1], Chief Justice Cockburn, while considering a by-law passed by a local authority, said

"I think it is quite clear that the regulation as to rules being made by one or other of those authorities, for the pupose of imposing conditions on the delivery of addresses in the park, was clearly within the jurisdiction of the ranger or the commissioners, as the case might be, and that being so, we have no authority here to look into the rules to see whether they are reasonable and proper or not"

But this opinion was doubted in a leading case, which has now become a classical case on the validity of a by-law passed by local authority—*Kruse* v *Johnson*[2]. Lord Russell, C.J., said:

"When the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be

1. (1873) L R. 8 Q B 118 at 124.

2 (1898) L R 2 Q B D 91, 99

approached from a different standpoint They ought to be supported if possible They ought to be, as has been said ' benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. . . . I think Courts of Justice ought to be slow to condemn as invalid any by-law. . . . on the ground of supposed unreasonableness. . . . . . I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws made under such authority as these were made, as invalid because unreasonable if for instance they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, ' Parliament never intended to give authority to make such rules, they are unreasonable and *ultra vires*' "

Applying the tests to the facts of the instant case, I do not think that the by-law is either unjust, unreasonable or unsound It is a notorious fact that persons who carry on advertisement business or indulge in advertisement exercise their rights vulgarly by exhibiting them on every conceivable place such as lanes, roads, residential houses, bridges, hospitals and religious places, and thereby make the City ugly, unlovely, ghastly and horrible. Therefore it is but proper that the Corporation should frame a by-law under their statutory powers to provide for the prohibition and regulation of advertisements I do not also agree that it would amount to a total prohibition or prevention of advertisement Nor do I see that any discrimination is involved in this by-law. It is for the Corporation to regulate, restrict or prevent the exhibition of advertisements, if they are exhibited in such places and in such manner, and by such means, as to affect injuriously the life and face of the City. The Corporation must certainly have the power to regulate the methods of advertisements, with the object of safeguarding the public from dangerous, obstructive or ugly advertisements It is a reasonable restriction It is true that such a restriction may cause nuisance to some and annoyance to some others But it cannot, for that reason, be held that such a by-law is unreasonable or uncertain. Wright, J, observed in *Simmons* v *Malling Rural Council*[1]:

" . I do not think that a by-law should be held unreasonable on the ground that in a particular case inconvenient consequences might result from its enforcement, it is the public interest as a whole which has to be considered "

In *United Bill Posting Co, Ltd.* v. *Somerset County Council*[2], the respondents made a by-law that no advertisements should be exhibited on any hoarding, stand, or other similar erection so as to be visible from any public highway (whether carriage-way, bridgeway or footway), or from any public waterway (whether river, river-tributary or canal), or from any railway and to disfigure the natural beauty of the landscape Quoting the decision in *Kruse* v *Johnson*[3], their Lordships observed:

" It is true that the Council might name specific places if it thought fit, but it is within its powers in saying . 'you must not anywhere within the area which we have to administer erect advertisements which disfigure the natural beauty of a landscape; and if you erect advertisements at all (except in boroughs and urban districts) you do so at your own risk if they are found to offend against this rule' "

It is also worthwhile to quote the observations of Lord Russell, C J., in *Kruse* v. *Johnson*[3]

" A by-law, of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not to do as they pleased "

In the circumstances of this case, the petitioner cannot complain that the by-law in question is either unjust or unreasonable

The Writ Petition is dismissed There will be no order as to costs.

V K *Petition dismissed.*

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1 (1897) L R 2 Q B D 433 at 438
2 135 L.T 117
3 (1898) L.R 2 Q B.D. 91 at 96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

Kuppuswamy Goundar .. *Petitioner**

v.

Pichaikara Goundar and others .. *Respondents.*

Madras Panchayats Act (XXXV of 1958)—*Election Tribunal—Bare inspection and recount of votes rejected by the Returning Officer—Not matters of mere routine—Election petition to contain sufficient materials—Satisfaction of the Election Tribunal about necessity for inspection to do justice to controversy—Essential grounds.*

The respondent challenged the election of certain members to the Panchayat on the ground that 22 votes had been refused or rejected by the Returning Officer and that this was ' improper, invalid and illegal.' The District Munsif as the Election Tribunal, sent for these 22 votes, made an inspection and recount, accepted some votes and rejected others. He went into the propriety of other votes also some of which he rejected In the result he altered the results by declaring that the petitioner herein has lost the election On a revision filed at the instance of the petitioner

Held, the proceedings of the Election Tribunal are vitiated by error and are without jurisdiction.

Even a bare inspection and recount of votes rejected by the Returning Officer are not matters of mere routine An order for inspection was not a matter of course and that having regard to the secrecy of the ballot, the Court would be justified in granting the order for inspection only on two conditions being fulfilled, namely, (1) that the petition itself contained an adequate statement of material facts relied on by the petitioner in support of his case, and (2) that the Tribunal was *prima facie* satisfied that in order to satisfactorily do justice to the controversy, inspection of the ballot papers was essential.

The mere statement that the rejection of 22 votes was ' improper, invalid and illegal' is not at all sufficient compliance with the requirement.

Petition under Article 227 of the Constitution praying the High Court to revise the order of the Court of the Election Commissioner (District Munsif), Tiruvannamalai, dated 16th November, 1965 and made in O P No. 8 of 1965.

T. R. Ramachandran, for Petitioner.

K. Venkataswamy, *amicus curiae*

The Court made the following

ORDER.—It appears to me to be abundantly clear, from the facts which are not controverted, that the learned District Munsif—Presiding Officer—who acted as the Election Court in respect of the proceeding to set aside the election relating to Reddipalayam Panchayat, Chengam Taluk, held on 2nd February, 1965, quite misconceived the character of his functions and powers and the scope of his jurisdiction. The facts themselves are not in dispute and have not been challenged by the learned Counsel for the first respondent acting as *amicus curiae*, since the respondents themselves did not appear in this Court to contest the revision petition

Briefly stated, the situation is that with respect to Ward No. 1 of this Panchayat, three members had to be elected, and the respondents 1 to 3 were declared elected by the Returning Officer. The petitioner (first respondent) filed O P. No. 8 of 1965 challenging this election, on the ground of various infirmities and irregularities. In particular, he contended that 22 votes had been refused or rejected by the Returning Officer and that this was "improper, invalid and illegal." He made the averment that this improper rejection had materially affected the result of the election.

The learned District Munsif, as Election Tribunal sent for these 22 votes which had been segregated after rejection, and made an inspection and recount. Had he merely stopped there, probably something could be said for the legality of his proceedings. But he went further accepted some votes and rejected others, and not merely this, he went into the propriety of other votes also, some of which he rejected. The net result was that he declared that the petitioner before him (first

*C.R.P. No. 2447 of 1965. 29th September, 1966.

respondent) and respondents 1 and 3 before him were duly elected persons; respondent 2 before him (revision petitioner), was declared to have lost the election

Respondent 2 now institutes this proceeding in revision and I have heard the learned Counsel for the petitioner and the learned Counsel appearing *amicus curiae* for the absent respondents I do not think that it can be seriously doubted that the proceedings of the Election Tribunal were vitiated by error and excess jurisdiction First of all, even a bare inspection and recount of votes rejected by a Returning Officer, are not matters of mere routine In *Sowak* v *H K. Kulwa*[1], their Lordships of the Supreme Court had to consider a case in which it was the High Court that had granted a prayer for inspection and recount, though that relief had been denied by the Election Tribunal It was held by the Supreme Court that an order for inspection was not a matter of course and that having regard to the secrecy of the ballot, the Court would be justified in granting the order for inspection only on two conditions being fulfilled, namely (1) that the petition itself contained an adequate statement of material facts relied on by the petitioner in support of his case, and (2) that the Tribunal was *prima facie*, satisfied that in order to satisfactorily do justice to the controversy, inspection of the ballot papers was essential

In the present case, and this is the reason why I have earlier quoted from the petition all that the petitioner states is that the rejection of 22 votes was " improper, invalid and illegal " This is not at all sufficient compliance with the requirement laid down in the Supreme Court decision The petitioner should specifically state why he was impugning the rejection of these votes and what were the grounds therefor. If the Tribunal is satisfied that inspection and recount are necessary in the light of the averments, it may certainly proceed to order these steps This apart, it appears most doubtful if the Tribunal would have jurisdiction to proceed into the propriety of other votes not within the ambit of the pleadings at all This in effect is to constitute the Tribunal as a Returning Officer, which is not the intendment of the Rules The Supreme Court decision, no doubt, related to the Representation of the People Act, 1951, and the Election Rules (1961) thereunder. But it is not in controversy before me that the Election Rules with regard to Panchayats closely follow the Rules framed under the Representation of the People Act.

For these reasons, I allow the Revision Petition, set aside the order of the Election Tribunal, and remit the entire proceedings back to the Election Tribunal for disposal according to law With regard to the 22 votes the petitioner is bound to give particulars why he impugns the rejection of these votes and if the Tribunal is satisfied, it may certainly order inspection and recount. With regard to the propriety of the other votes, this will entirely depend on the allegations made, and the powers under the Rules for the Tribunal to reassess these facts or to recount them Ordered accordingly. The parties will bear their own costs.

V S. *Ordered accordingly.*

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1. (1964) 6 S.C.R. 238 : A.I.R. 1964 S C 1249.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction).

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE P. RAMAKRISHNAN.

Messrs. Murali Trading Co., Madras .. *Petitioners**

v.

The Joint Commercial Tax Officer, Mannady, West Madras. .. *Respondent*.

Madras General Sales Tax Act (I of 1959), section 16—Escaped or suppressed transactions of sale—Inference from entries of collection and collection slips with the employee—Written explanation submitted by assessee—Assessment order the next day—Explanation apparently not considered seriously—Rule of audi alterem partem *not complied with—Levy of assessment and penalty bad.*

In a case where the assessment was based primarily upon an inference of escaped or suppressed transactions of sale, on circumstantial evidence of a number of collection entries in the cash accounts and certain slips kept by the employee of the firm, it was held that where the inference of suppressed sales is based exclusively on collection entries and slips of entries there is virtually no hearing when these are not put to the assessee as circumstantial evidence of suppression and the firm is given no adequate opportunity to explain. On the facts of the case, it was held that the principle of natural justice *audi alterem partem* was not substantially observed as the assessee's explanation was not seriously and comprehensively considered by the assessing officer and accordingly the assessing authority was directed to consider the assessee's explanation.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records pertaining to the order of the respondent herein bearing No. M.G.S.T. No. 3567/63-64, 3567/64-65 and 3567/62-63, dated 30th January, 1965 and M.G.S.T. No. 3567/62-63 dated 26th February, 1965, imposing a penalty of a sum of Rs. 9,541 under section 16 (2) of the Madras General Sales Tax Act, 1959 respectively and to quash the same.

V. K. Thiruvenkatachari for *K. C. Jacoob* and *S. K. L. Ratan*, for Petitioner.

R. Srinivasan and The Special Government Pleader (C.T.), for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, C.J.—We have considered the scope of these writ proceedings, and the facts with reference to which they have been instituted. We think it is sufficient for us to observe that, in all these cases, the assessment has been primarily based upon an inference of escaped or suppressed transactions of sale of soaps, liable to be taxed, on the circumstantial evidence of a number of collection entries in the cash accounts, and certain slips kept by the employee of the firm in charge of cash.

Very briefly stated, the crux of the argument of learned Counsel for the concerned firm (Sri Thiruvenkatachari) is that these inferences are not warranted by the circumstantial evidence referred to above. His claim is that his client (assessee) undertook to explain every one of these items relied on, as relating to and explicable in terms of other items in the cash accounts, and not as constituting any evidence, in any sense, of suppressed sales. Learned Counsel argues further that there is no contention that there is evidence about other concealed purchases of soaps from the main manufacturing firm, from which this firm has admittedly derived its entire stock.

Had we been proceeding into this matter on the merits, a great deal more might have to be said, but, in view of one outstanding fact, we think that these proceedings can be disposed of within a very brief compass. This outstanding fact is that we

*W.P. Nos. 1122, 1159, 1160 and 1161 of 1965. 20th September, 1966.

are satisfied that the principle of natural justice, *audi alterem partem* was not substantially observed. It is not in dispute that on the 29th January, an explanation in writing was submitted by the assessee-firm, regarding the inferences sought to be based on these entries of collections and slips noting cash balances, and that the actual order of assessment was issued on 30th January. We have carefully perused that order, and we find in it very little or no evidence that the explanation sought to be offered by the assessee-firm with regard to each one of these items, claimed by the firm to be based on the internal evidence of the account entries themselves, was seriously and comprehensively considered by the assessing officer. It appears from the record that certain prior interviews with occasions for oral submissions, preceded the written explanation, but, as far as the affidavit, counter-affidavit and the reply affidavit go, it is a case of denial by the assessee-firm that at these interviews there was an adequate opportunity to explain these items, or that any such explanation was duly considered by the assessing officer

We may here record that learned Counsel for the Government, with commendable fairness, conceded that, as the record stands, there is no evidence that the explanation sought to be put forward by the assessee-firm in the detailed terms of the accounts, with regard to every one of the items relied on, was actually put forward during the prior interviews, and considered by the assessing officer, before the order of assessment was made In effect, therefore, the rule of *audi alterem partem* was not substantially observed We need not emphasise that, where the inference of suppressed sales is based almost exclusively on collection entries and on slips of entries, there is virtually no hearing where these are not put to the assessee-firm as circumstantial evidence of suppression, and the firm is given no adequate opportunity to explain Even the explanation in writing of the 29th January, leaving alone whatever was explained as prior interviews, hardly appears to have received consideration judging from the internal evidence of the order of assessment. On this ground alone, and without any reference whatever to the merits of the assessment, we are of the view that the relevant assessments in these proceedings ought to be struck down

Those assessments are for 1962-63 in W P No 1160 of 1965 with penalty thereon (W P No 1161 of 1965), for 1963-64 in W P. No 1122 of 1965 and a provisional assessment for 1964-65 in W P No. 1159 of 1965. All these are linked in a chain as consequential assessments on the basic assessment, and every one of them will have to be investigated in the light of the detailed explanations sought to be furnished by the assessee.

We, therefore, direct that the writs would issue striking down the assessments and that the detailed explanations of the assessee now supplemented by further detailed statements, should be taken up and considered, and the assessment carried through again in due compliance with the requirements of law, and the principles of natural justice The concerned assessee is directed to withdraw the appeals pending before the Sales-Tax Appellate Tribunal, in view of the allowance of the writs Parties will bear their own costs.

K.G.S. *Assessments quashed; direction issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

Ramathal and others .. *Appellants**

v.

Nagarathinammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rules* 90, 92 *and Order* 34, *rule* 5—*Mortgage decree—Final decree for sale.—Purchase by auction purchaser—Application for setting aside sale under Order* 21, *rule* 90—*Dismissal—Confirmation of sale and taking possession by auction purchaser—High Court in appeal, restoring application under Order* 21, *rule* 90—*Pending appeal in High Court, sale by auction purchaser and putting purchaser in possession—Subsequent application by mortgagor to deposit amounts due under mortgage—Restoration of application under Order* 21, *rule* 90—*Vacates order confirming sale—Relief against purchaser from auction purchaser*—Lis pendens.

In pursuance of a final decree under a mortgage action, the hypotheca was sold. An application filed under Order 21, rule 90 of the Civil Procedure Code for setting aside the sale was, on account of alleged default on the part of the applicant, dismissed and the sale confirmed on the same date, and the auction purchaser put in possession. But in appeal the High Court set aside the dismissal of the application and directed the trial Court to dispose of that application in accordance with law. During the pendency of the appeal in the High Court, the auction purchaser sold the property to another who was also a party in the subsequent proceedings. After the restoration of the application under Order 21, rule 90, Civil Procedure Code, an application under Order 34, rule 5, Civil Procedure Code, for leave to deposit the mortgage money and other statutory charges and for treating the mortgage as discharged and for obtaining possession of the property from the auction purchaser and his purchaser, was allowed by the trial Court. Hence the appeal.

Held, the restoration of the application under Order 21, rule 90, Civil Procedure Code, automatically operated to vacate or render ineffective, the earlier order confirming the sale held in pursuance of a final decree in a mortgage action.

The reversal of the decree of the trial Court in appeal or the setting aside of the *ex parte* decree does not *per se* render the Court sale in execution of the former decree void, but they only give rise to certain equities which can be granted in proper cases. But the restoration of a petition under Order 21, rule 90 of the Code after the earlier confirmation of the Court sale results in an entirely different situation. It renders the Court sale itself void and ineffective and that is the reason why in proceedings under Order 34, rule 5 of the Code the position of the auction purchaser and the purchaser from him is entirely different.

Having regard to the provisions of section 47, *Explanation* and section 146 of the Code, every remedy which Order 34, rule 5 has provided against the auction purchaser can also be claimed against the purchaser from the auction purchaser. In proceedings under Order 34, rule 5 the purchaser from the auction purchaser may be directed to deliver possession.

In the case of a mortgage decree, the *lis* will continue till the proceedings under Order 34, rule 5 of the Code come to an end and the mortgage security is finally discharged. The doctrine of *lis pendens* will apply to the private sale by the auction purchaser in the mortgage action. Such a sale cannot be relied upon by the vendee to defeat the rights which the statute has granted to the mortgagor against the auction purchaser.

Appeals against the order of the Court of the Subordinate Judge of Coimbatore dated 18th November, 1963, and made in E.A. No. 80 of 1963 in E.P.R. No. 248 of 1957 in O.S. No. 37 of 1955, E.A. No. 525 of 1963 in E.P.R. No. 248 of 1957 in O.S. No. 37 of 1955, E.A. No. 80 of 1963 in E.P. R. No. 248 of 1957 in O.S. No. 37 of 1955 and E.A. No. 525 of 1963 in E.P.R. No. 248 of 1957 in O.S. No. 37 of 1955 respectively.

S. V. Venugopalachari, for Appellants.

T. R. Srinivasan, for Respondents.

The Judgment of the Court was delivered by

Ramakrishnan, J.—These connected appeals are directed against the order of the learned Subordinate Judge of Coimbatore in E.A. Nos. 80 and 525 of 1963 in O.S. No. 37 of 1955. The prior facts necessary for the consideration of these appeals are briefly the following :—

The schedule property was made the subject of a simple mortgage executed on 7th July, 1949, by Nagarathinammal and Chandrasekharan, respondents 1 and 2

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*A.A.O. Nos. 370 of 1963 and 207, 232 and 410 of 1964. 4th November, 1966.

in the appeals. R K Kandaswami, the fourth respondent, obtained a preliminary decree on the mortgage on 14th August, 1956, and thereafter, a final decree on 2nd March, 1957, for the sale of the hypotheca. The property was sold in Court auction on 2nd April, 1958, and purchased by Dhandayuthapani Chettiar, the appellant in A A O. Nos 232 of 1964 and 410 of 1964. On 14th June, 1958, Nagarathinammal, Chandrasekharan, and one Ramaswami Gounder who obtained an agreement for sale of the hypotheca in his favour from the mortgagors, filed an application under Order 21, rule 90, Civil Procedure Code, for setting aside the sale, on account of material irregularities in the conduct of the sale. They also furnished security required under the Rules But on account of some alleged default, this application was dismissed on 26th July, 1958 The sale was confirmed on 26th July, 1958, itself, and the auction-purchaser took possession on 19th November, 1958 Thereafter, Chandrasekharan, Nagarathinammal and Ramaswami Goundar filed appeals, A A O Nos 105 and 106 of 1959 in the High Court. In A A O No 105 of 1959, a Bench of this Court, consisting of Ramachandra Iyer, Chief Justice and one of us, passed an order on 8th February, 1962, holding that the learned Subordinate Judge was under a misapprehension, in finding that the appellants were in default, and, thereafter, the order of the lower Court dismissing the application under Order 21, rule 90, Civil Procedure Code, was set aside, and the lower Court was directed to dispose of that application in accordance with law The appeal which was simultaneously heard, A A O No 106 of 1959, was against the order confirming the sale, and, therein, the Bench observed, that no separate orders were necessary, in view of the allowance of the appeal A A O No 105 of 1959, and the restoration and remand of the application under Order 21, rule 90, Civil Procedure Code, for fresh disposal

During the pendency of the aforesaid two appeals in the High Court the auction-purchaser conveyed the property to one Ramathal on 19th November, 1958, and she is now the appellant in A A O Nos 370 of 1963 and 207 of 1964 before us. After the restoration of the petition under Order 21, rule 90, Civil Procedure Code, Chandrasekharan, Nagarathinammal and Ramaswami Goundar filed on 27th November, 1962, an application under Order 34, rule 5, Civil Procedure Code, E A No 80 of 1963, for leave to deposit the mortgage money and the other statutory charges and solatium to the auction-purchaser, and prayed for treating the mortgage security as discharged, and for getting back possession of the property both from the auction-purchaser as well as the purchaser from him Simultaneously, they filed E A No 525 of 1963, under sections 47 and 151, Civil Procedure Code, to set aside the confirmation of the sale, in view of the orders passed in A A O No. 105 of 1959 and A A O No 106 of 1959 These applications were strenuously opposed by the decree-holder, the auction-purchaser in the Court auction sale, and the private purchaser from the auction-purchaser.

The learned Subordinate Judge held that the effect of the restoration of the petition filed under Order 21, rule 90, Civil Procedure Code, by the appellate order of this Court, was, by implication, to set aside the confirmation of the sale Therefore, the application E A. No 525 of 1963 for setting aside the confirmation of the sale, was treated as unnecessary and, as one filed merely by way of abundant caution. The learned Subordinate Judge also held in E. A No 80 of 1963, that, in view of the restoration of the petition under Order 21, rule 90, Civil Procedure Code, the mortgagors had a right to get the appropriate reliefs under Order 34, rule 5, Civil Procedure Code, and that they could obtain those reliefs both as against the Court auction purchaser, as well as the purchaser from the auction purchaser. Further, since the latter had purchased the property during the pendency of the appeals, A A O Nos 105 and 106 of 1959, the purchase was hit by the doctrine of *lis pendens*, and no equities available to a purchaser in good faith, would be available to Ramathal. Regarding the correctness of the quantum of money in deposit, it was urged that the interest subsequent to the date of the Court sale, had not been deposited, but the lower Court repelled that argument, and held that the correct amount had been deposited. In the result, both the applications were allowed,

and the learned Subordinate Judge passed a decree setting aside the sale, directing the respondents to deliver the documents of title to the mortgagors, directing them to transfer the mortgage property to the third petitioner therein, namely, Ramaswami Goundar, and directed them also to deliver possession. Respondents 1 and 2 in the petition, or the one or the other of them, were given the right to withdraw the amount deposited by the petitioners. As mentioned already, the present two appeals are filed by the Court-sale auction-purchaser and the purchaser from the auction-purchaser.

The principal points that arise for consideration in these appeals are (1) whether, by reason of the confirmation of the sale in Court auction, the auction-purchaser got a valid title to the schedule property, and whether that title became void by the subsequent orders in A.A.O. Nos. 105 and 106 of 1959 and the consequent restoration of the application under Order 21, rule 90, Civil Procedure Code; (2) whether, Ramathal, the appellant in A.A.O. Nos. 370 of 1963 and 207 of 1964, is a *bona fide* purchaser for value from the Court auction-purchaser, and whether her title can be defeated by the aforesaid proceedings; in any event, is she entitled to equities in her favour, by reason of improvements to the property which she made in good faith; and (3) does the amount deposited by the mortgagors and Ramaswami Goundar represent the correct amount payable under the provisions of Order 34, rule 5, Civil Procedure Code, and, if not, are they entitled to have the auction sale set aside and the mortgage security discharged?

Points (1) and (2): The arguments urged before us by learned Counsel, for dealing with these points, cover a wide range of ground, besides reference to a considerable volume of authorities, but, before we consider them, it will be useful to set down briefly the prior history of Order 34, rule 5, Civil Procedure Code, the cope of which we have to consider in these appeals.

The old Transfer of Property Act (IV of 1882), provided for analogous reliefs, in section 89, whose terms were very brief, and stated that, if the defendant paid to the plaintiff or into Court on the day fixed, the amount due under the mortgage together with costs and subsequent costs, the defendant should, if necessary, be put in possession of the mortgaged property, but if such payment was not so made, the plaintiff or the defendant might apply to the Court for an order absolute for sale of the mortgaged property, and the Court should then pass an order that such property be sold, and thereupon the defendant's right to redeem and the security should both be extinguished. This provision gave rise to several difficulties, in its working. For instance, there were difficulties as to the time-limit for application for the passing of a final decree for sale and the correct provision of the Limitation Act which would be applicable—see Mulla's Civil Procedure Code, 12th Edition, page 1097. Again, the provision in section 89 for extinguishing the right of redemption on the passing of an order for absolute sale, also gave rise to difficulties. Thus irregularities might exist in the conduct of the sale which might lead to setting aside of the sale on the proof of such irregularities, but, by that time, the right to redeem and the security might have been extinguished. For the purpose of avoiding these and other difficulties, when the Civil Procedure Code was amended by Act V of 1908, section 89 and the succeeding sections in the Transfer of Property Act were deleted, and they were embodied in the new Civil Procedure Code with substantial amendments, in the form of the several rules of Order 34, Civil Procedure Code. The main effect of these changes was that the mortgagors or any other person interested in the hypotheca obtained the right to apply and get an order treating the mortgage security as extinguished, and to get back possession of the hypotheca if necessary, after depositing a certain prescribed amount in the Court, either before the sale directed under the preliminary decree, or, if the sale had been held under a final decree for sale, at any time before the confirmation of the sale. There is no time-limit for making such an application, and the right is available as long as the sale is not confirmed. The new provision in Order 34, rule 5, Civil Procedure Code, also provided for relief to be given to the auction-purchaser at the sale by payment of the sale price and a solatium of 5 per cent. as his sale becomes

vacated. For this purpose, he is made a necessary party to the Order 34, rule 5, proceedings. In Madras, there is a further amendment which requires that, on the application made by the plaintiff for passing a final decree, notice shall be given to all the parties.

The first and perhaps the most important question for consideration in this case is the effect which the order restoring the petition under Order 21, rule 90, Civil Procedure Code, by the appellate Court in A.A O Nos. 105 and 106 of 1959, will have on the prior proceedings in the trial Court which had already taken place following the confirmation of the sale, namely, the sale and delivery of possession of the hypotheca to the auction-purchaser, followed by the subsequent private sale and delivery of possession to Ramathal. The prior decisions of this Court cited at the Bar on this point, hold that, on the restoration of the petition under Order 21, rule 90, Civil Procedure Code, the confirmation of the sale becomes automatically void The authorities are (I) (*Venkata Narasimhan* v. *Nagoji Rao*)[1] (Horwill and Koman, JJ), (2) *Varadarajan* v. *Venkatapathi Reddi*[2], Satyanarayana Rao and Krishnaswami Nayudu, JJ. In the latter decision, the learned Judges, in an elaborate judgment, in which they followed the earlier decision, held that the restoration of the application under Order 21, rule 90, Civil Procedure Code, automatically operated to vacate or render ineffective, the earlier order confirming the sale under Order 21, rule 92, Civil Procedure Code. This decision dealt with a final decree for sale of the mortgaged property followed by a petition under Order 21, rule 90, Civil Procedure Code, for setting it aside, therefore it must be treated as on all fours with the present case, (3) *Satyanarayana* v *Ramamurthi*[3], which followed the above two earlier decisions of this Court, (4) *Valli Ammal* v *Subramania Iyer*[4], a decision of Ramachandra Iyer, C.J., and (5) an unreported decision of Ganapatia Pillai, J., in (*S A. Ramaswami Goundar* v. *Manager, Kasturi Rangappa Chettiar and another*)[5] Following the above line of authorities, we uphold in this case, the decision of the trial Court, that on the restoration of the petition under Order 21, rule 90, Civil Procedure Code, the confirmation of the sale became automatically vacated.

The next question for consideration is the position of the auction-purchaser, when the confirmation of his sale got automatically vacated, on the subsequent restoration of the petition under Order 21, rule 90, Civil Procedure Code. The title of the auction-purchaser under an unconfirmed sale must be treated as a conditional one, which becomes absolute only on confirmation. Under section 65 of the Civil Procedure Code, such confirmation acts retrospectively from the date of sale, but, till the confirmation, the title remains inchoate, and, in the absence of confirmation, no title passes to the purchaser. The position will be the same, when there is a confirmation, but such confirmation becomes vacated by reason of a subsequent order restoring the petition under Order 21, rule 90, Civil Procedure Code This result has been succinctly described by the Privy Council in *Chandramani Shaha* v *Anarjan Bibi*[6], (that case also dealt with an auction sale, in execution of a mortgage decree followed by an application under Order 21, rule 90, Civil Procedure Code) as follows :

> "Again, take a case in which the Subordinate Judge disallowed the application to set aside the sale , there would then be confirmation of the sale by the Subordinate Judge and the sale would become absolute as far as his Court was concerned If the High Court allowed an appeal, and set aside the sale, there would then be no sale, and, of course , no confirmation and no absolute sale."

Apart from these cases, as pointed out by the learned Counsel for the respondent, if the Court sale is vitiated by fraud, the auction-purchaser cannot set up good faith to defend his title when challenged, if the sale is set aside on a petition under Order 21, rule 90, Civil Procedure Code—*Bireswar Ghose* v. *Panchkouri Ghose*[7].

1. (1946) 1 M L J 216
2. (1953) 1 M L J 148.
3. (1960) 2 An W R 431.
4. (1964) 1 M.L J.275.
5. C R P. No 1526 of 1961
6. L R 61 I A. 248 67 M.L J. 79 (P.C) : I L.R.61 Cal 945, at 952.
7. 27 C.W.N. 587.

There is another line of authority cited by the learned Counsel Sri Venugopalachari for Ramathal. They deal with cases where in pursuance of the decree of the trial Court, the property is sold in execution and purchased by a stranger and thereafter the decree is set aside in appeal, or an *ex parte* decree is passed and the property is sold in execution and purchased by a stranger, and subsequently the *ex parte* decree is set aside or the appellate Court sets aside the lower Court's decree, and thereafter restitution is applied for. In such cases, it is observed that it is necessary to protect the interest of the auction-purchaser who had purchased in good faith especially when he is a stranger, the decisions also hold that there can be no restitution in such cases. The reasoning in these cases proceed on the basis that, otherwise, there will be less inducement to intending purchasers to buy at execution sales and less chance of the property fetching proper price at such sales. Typical of such cases are *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan*[1] and *Rewa Mahton* v *Ram Kishen Singh*[2], followed in *Mukheda Dasi* v *Gopal Chunder Dutta*[3], *Shivlal Bhagvan* v. *Shambhu Prasad*[4] (doctrine of *lis-pendens* will not apply to such cases), *Sheik Ismail Rowther* v. *Raja Rowther*[5] and *Chockalingam Asari* v. *Krishna Iyer*[6]. These decisions proceed on the broad principle that the reversal of the decree of the trial Court in appeal, or the setting aside of the *ex parte* decree does not *per se* render the Court sale in execution of the former decrees void, but they only give rise to certain equities which can be granted in proper cases. But the restoration of a petition under Order 21, rule 90, Civil Procedure Code, after the earlier confirmation of the Court sale results in an entirely different situation. It renders the Court sale itself void and ineffective, and that is the reason why in proceedings under Order 34, rule 5, Civil Procedure Code, the position of the auction-purchaser and the purchaser from the auction-purchaser is entirely different from the situation visualised in the case cited above by Sri Venugopalachari which justifies restitution on the setting aside or the modification of the trial Court's decree by the appellate Court or the setting aside of an *ex parte* decree.

The decision in *Irulayee Ammal* v. *Murugiah*[7], cited by Sri Venugopalachari appearing for Ramathal dealt with a different state of affairs and can have no application to this case There, after a preliminary decree on a mortgage, pending an application for scaling down under Act IV of 1938, there was stay of further proceedings for sale of the property. But there was no stay asked for in respect of one item of the hypotheca which was sold in Court auction, and then repurchased by a stranger. It was held that the interest of this auction-purchaser alone would be saved, because there was no stay in regard to the sale of the property in which he became interested. *R Kunjukrishnan* v. *R. Viswanathan*[8], a decision of a single Judge, referred to by Sri Venugopalachari also dealt with a different state of affairs. There, after the dismissal of a petition under Order 21, rule 90, Civil Procedure Code, the sale was confirmed. The petition under Order 21, rule 90, Civil Procedure Code, was restored in appeal, and, after rehearing, it was again dismissed It was held that the right of the auction-purchaser revived on the dismissal of the Order 21, rule 90 petition for the second time. That case has no application here. On the other hand, a purchaser of the hypotheca, in pursuance of a decree for sale, is put on notice of the statutory provision regarding the provisional nature of, his title, which remains inchoate and conditional as long as the sale is not confirmed, and an application under Order 21, rule 90, Civil Procedure Code, is pending. If after such confirmation, there is an appeal against the order dismissing the petition for setting aside the sale under Order 21, rule 90, Civil Procedure Code, the issue of the title of the auction-purchaser is set at large, pending the decision in the appeal. If this appeal is allowed and the petition under Order 21, rule 90, Civil Procedure Code is restored, the confirmation of the sale is vacated, and the title of the auction-purchaser again becomes inchoate and conditional. Such a situation has no analogy

1. L.R 15 I.A. 12 : I.L.R. 10 All. 166 (P.C.).
2. I.L R. 14 Cal. 18.
3. I L R 26 Cal 734
4. I.L.R. 29 Bom. 435 (F.B.).
5. 17 M.L J 165. I.L.R. 30 Mad. 295.
6. (1964) 77 L W 233.
7. (1950) 2 M L J 171.
8. A.I.R. 1964 Ker. 314.

to a decree of the first Court being reversed in appeal or an *ex parte* decree being reversed in appeal or an *ex parte* decree being set aside. Questions relating to restitution whether under the specific provision of section 145 of the Civil Procedure Code or under general principles of restitution and as to how far the interests of the auction-purchaser will be protected in such circumstances will arise only in the latter type of cases.

Decisions dealing with the latter type of cases cannot be relied upon, as authority for considering the position of an auction-purchaser whose sale is vacated in proceedings under Order 34, rule 5, Civil Procedure Code. First of all, in such cases, through the setting aside of the confirmation, the title of the auction-purchaser disappears. Secondly, the statute has made him a necessary party to the proceedings, and has also prescribed the reliefs to which he will be entitled, by reason of his sale proving infructuous and his failure to obtain a title thereunder. The very fact that the person who makes the deposit is required also to deposit the solatium payable to the auction-purchaser shows that it was intended to relieve the property of whatever interest which the auction-purchaser might have acquired in it by reason of his purchase, and to compensate him for the loss of that interest by giving him the solatium besides the purchase price. He cannot claim anything else, in addition to the reliefs which the law has thus prescribed.

The further question is as to the position of a private purchaser from the auction purchaser, the position which Ramathal occupies. In the earlier part of this judgment, we have given a sequence of dates, which shows that the purchase of Ramathal, though no doubt after the confirmation, was during the pendency of the earlier appeals before this Court. Learned Counsel Sri T. R. Srinivasan appearing for the respondents, referred to the *Explanation* under section 47, Civil Procedure Code, which states that every purchaser at a sale in execution of a decree is a necessary party, for the purpose of deciding all questions arising under section 47 relating to the execution, discharge or satisfaction of the decree. The amendment of the Civil Procedure Code, in 1908 has made the auction-purchaser a necessary party to the proceedings under Order 34, rule 5, Civil Procedure Code. The issues about the extinction of the mortgage security, the payment of the mortgage money to the person entitled to it and the restoration of possession in appropriate cases, where it is called for, have to be decided in the presence of the auction-purchaser. Learned Counsel Sri T. R. Srinivasan referred to section 146 of the Civil Procedure Code which provides that, where any proceeding may be taken or application made by or against any person, such proceeding may be taken or application may be made by or against any person claiming under him. Ramathal is obviously claiming under the auction-purchaser. Therefore every remedy which Order 34, rule 5 has provided against the auction-purchaser can also be claimed against Ramathal the purchaser from the auction-purchaser, in the same proceedings, because she stands squarely in the shoes of the auction-purchaser.

Further, it is urged by the respondents that she cannot also claim any relief in the proceedings, so as to affect the rights of the mortgagor and mortgagees over the hypotheca, as they stood on the date of the preliminary decree, and which formed the subject-matter of the sale, are concerned and for this purpose, the doctrine of *lis pendens* was also relied upon by the respondents. *Explanation* to section 52 of the Transfer of Property Act states that the pendency of a suit or proceeding for the purpose of applying that doctrine as stated in section 52 will continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of the decree or order has been obtained. In the case of a mortgage decree, the *lis* will continue till the proceedings under Order 34, rule 5, Civil Procedure Code come to an end and the mortgage security is finally discharged. The doctrine of *lis pendens* will apply to the private sale by the auction purchaser, such a sale cannot be relied upon by the vendee, to defeat the rights which the statute has granted to the defendant, against the auction-purchaser in proceedings under Order 34, rule 5, Civil Procedure Code. Learned Counsel Sri T. R. Srinivasan for the respondents referred in this connection to the decision

of the Privy Council in *Parmeshari Din* v *Ram Charan*[1] In that case, the mortgagor had executed a usufructuary mortgage to one Parmeshari Din, who also purchased the equity of redemption during the execution of a money decree against the mortgagor, and came into possession during the pendency of the plaintiff-mortgagee's (respondent before the Privy Council) suit for foreclosure, and the plaintiff, relying upon the rule of *lis pendens* sought to recover possession of the property from the transferee, and the lower Court granted the relief to the plaintiff Parmeshari Din appealed to the Privy Council Sri Shadi Lal, who gave the judgment of the Privy Council, observed at page 361

> "But he (the appellant) took the property from the defendant (mortgagor) *pendente lite* and must be treated as his representative-in-interest He is bound by the result of the decree If he had not obtained possession of the property from the defendant, the latter would have been required to deliver it to the plaintiffs And the mere circumstance that he got possession from the defendant in pursuance of a transfer which was invalid as against the plaintiffs, cannot detract from their rights under the decree."

It was held, therefore, that the decree-holders were entitled to execute the decree against the appellant who was the representative of their judgment-debtor and consequently to recover possession from him. The words 'claiming under' used in section 146 of the Civil Procedure Code would include devolution and assignment of interest mentioned in Order 22, rule 10, Civil Procedure Code, and these words should be construed liberally so as to advance justice and not in a restricted or technical sense—See *Saila Bala* v *Nirmala Sundari*[2], followed in *Brahm Dutt* v. *Life Insurance Corporation*[3].

Learned Counsel Sri S. V Venugopalachari appearing for Ramathal, urged that, in any event, during the proceedings under Order 34, rule 5, Civil Procedure Code, this Court cannot direct delivery of possession and that this Court, should stop with declaring the title, leaving it to the parties to obtain possession in execution proceedings, and, in such proceedings, Ramathal may be entitled to make a counter-claim for reliefs like the value of improvements and so on. With this contention also, we are unable to agree. Order 34, rule 5, Civil Procedure Code, is intended to provide for a final settlement of all the claims arising under the mortgage including those arising under the Court sale in pursuance of the preliminary decree. The Statute has made the auction-purchaser in such a sale, a necessary party to the adjudication, and by application of the principle of section 146, Civil Procedure Code, the auction-purchaser's purchaser *pendente lite* will also become a necessary party to the adjudication Now, the title as well as possession which Ramathal obtained from the auction-purchaser was the very same title and possession which the auction-purchaser obtained in pursuance of the Court sale, and if she could, standing in the shoes of the auction-purchaser, take the mortgage money and the solatium as she is entitled to under Order 34, rule 5, Civil Procedure Code, she could be equally required by an order in the course of the same proceedings to surrender the possession which she obtained in pursuance of the sale from the auction-purchaser Such a direction will be within the scope of Order 34, rule 5, Civil Procedure Code. Further, learned Counsel Sri T. R. Srinivasan contends that it may be plausibly argued, if independent proceedings are taken later, that the relief against Ramathal not having been obtained in the proceedings under Order 34, rule 5, Civil Procedure Code, would be barred. We, therefore, confirm also the order of the lower Court regarding the direction for delivery of possession both against the auction-purchaser as well as Ramathal.

Learned Counsel Sri Venugopalachari appearing for Ramathal urged that she had made valuable improvements to the property, believing in the validity of the transfer. Since there is no evidence on this point, we do not wish to say anything about it here. In fact, she has not even filed her sale deed We would leave this question open to be adjudicated in independent proceedings, so that

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1. (1937) 2 M L J 359 S C 394.
2. (1958) 2 M L J (S C) 99 . (1958) S C J 743 · (1958) 2 An W R. (S C) 99 : A I R. 1958
3. A I R. 1966 All 474

Ramathal may get the value of the improvements, if she is able to establish her claim to it.

Point (3) : Learned Counsel appearing for the auction-purchaser stated that the amount deposited in the Court was not the correct amount as required under Order 34, rule 5, Civil Procedure Code The learned Subordinate Judge has, in his order, observed that the money to be deposited will be the money that is specified in the preliminary decree and that the question as to whether mesne profits or interest would be claimable did not require consideration. The order of the learned Subordinate Judge under appeal shows that only a question of interest subsequent to the date of the Court-sale was pressed before him But as against this it was urged by learned Counsel, Sri T R. Srinivasan on the opposite side that the auction-purchaser and the purchaser from the auction-purchaser obtained possession of the property and were in enjoyment of the property and got benefit out of it which might exceed even the amount of interest payable on the property and that in such a contingency, the respondents might be entitled to claim mesne profits In such circumstances the learned Subordinate Judge was inclined to disallow interest. We see no grounds to interfere with that finding.

The appeals are dismissed with costs Advocate's fee at one set.

S.V J. ——— *Appeals dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR JUSTICE K. SRINIVASAN.

Cosmopolitan Club, Madras, represented by its Honorary Secretary D. Kesava Reddy .. *Petitioner**

v.

The Regional Provident Fund Commissioner, Madras . *Respondent.*

Employees Provident Funds Act (XIX of 1952), *section* 1 (3)—*Applicability to non-proprietary and non-commercial clubs—Notification under section* 1, *sub-section* (3) (*b*) *of the Act—Validity of—Establishment—Meaning of*

A notification issued by the Government under section 1, sub-section (3) (*b*) of the Employees Provident Funds Act to the petitioner club informing that the Act has been made applicable to it and thereby calling upon it to submit the necessary return to give effect to the Provident Fund Scheme. It was contended on behalf of the petitioner that such a notification was beyond the ambit of that provision and is *ultra vires* and illegal, as the Act is intended to apply only to commercial organisations and not to non-proprietary and non-commercial associations such as the petitioner club

Held: the plain language of sub-section (3) (*b*) contrasted with sub-section (3) (*a*) of section 1 of the Act, indicates two broad classifications (*i*) one establishment which is a factory engaged in any scheduled industry and (ii) " any other " establishment which would mean one which may not be of the nature of a factory engaged in any specified industry The power conferred by sub-section (3) (*b*) accordingly enables the Government to apply the Act to any establishment, though it is not a factory and is not engaged in any scheduled industry, but which employs 20 or more persons

Though the expression "Establishments" has not been defined and is capable of a variety of meanings but where such an expression in common use is embodied in a Statute, that particular aspect of the meaning of that expression which conforms to the underlying object and policy of the Statute should be adopted The word " Establishment " not being qualified in any way in this Act, only means as organisation which employs a certain number of persons and nothing more

The Act itself was made for the purpose of providing for the institution of provident fund for employees in factories and other establishments and the dominant intention expressed both by the title as well as the contents of the Act would thus appear to be that it is enacted in the interests of employees in establishments not below a particular size Such being the case, whether it is a proprietary or non-proprietary club, so far as the employees of either institution are concerned, they stand on the same footing Having regard to the previous history of the enactment and the changes it has undergone, it cannot be said that it was always the intention of the Legislature only to apply it to establishments in the nature of business undertakings

State of Bombay v *Hospital Mazdoor Sabha,* (1960) S C J 679 (1960) S C R 866 A I R 1960 S C 610 and *Mahamed Ali* v *Union of India,* (1964) 1 S C J 329 A I R. 1964 S C 980, considered

*W.P. No. 1058 of 1963. 25th November, 1966.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Regional Provident Fund Commissioner, Madras, the respondent herein to forbear from proceeding further in the matter in pursuance of his Memo No C/MD/3084 Regl, dated 29th July, 1963.

A. K Sreeraman, for Petitioner.

Habibulla Badsha, for Government Pleader, for Respondent

The Court made the following

ORDER —The petitioner is the Cosmopolitan Club, Madras The respondent, the Regional Provident Fund Commissioner, Madras, issued a notice dated 29th July, 1963, to the petitioner informing the petitioner that, with effect from 1st July, 1963, the Employees' Provident Funds Act had been made applicable to the petitioner club and called upon the petitioner to submit the necessary return in order to give effect to the Provident Fund Scheme The petitioner has come to Court claiming that the club, which is a body corporate registered under the Indian Companies Act, is a social recreational association formed for the purpose of affording to its members the privileges, advantages and conveniences of a club. It is claimed that the notification issued by the Government under section 1, sub-section (3) (*b*) of the Act, which purported to bring within the scope of the Employees' Provident Funds Act institutions like the petitioner club, is beyond the ambit of that provision and is *ultra vires* and illegal It is principally contended that the Act is intended to apply only to commercial organisations and not to non-proprietary associations such as the petitioner club, which provides certain amenities and facilities to its own members

On behalf of the respondent, the complaint that the notification is in excess of the provision referred to is resisted

The Employees' Provident Funds Act, 1952, by section 1, sub-section (3) (*a*), makes it applicable (subject to what may be termed the infancy protection outlined in section 16 of the Act) " to every establishment which is a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed " Schedule I contains a list of industries. Section 4 of the Act empowers the Central Government to add any other industry to Schedule I. We are not, however, concerned in the present case with an establishment which is a factory engaged in a specified industry Sub-section (3) (*b*) of the Act makes the Act applicable "to any other establishment employing 20 or more persons, or class of such establishments, which the Central Government may, by notification in the Official Gazette, specify in this behalf " There is a proviso to this section which confers a further power upon the Central Government to apply the Act to establishments employing even less than 20 persons. The plain language of this provision, sub-section (3) (*b*) contrasted with sub-section (3) (*a*) of section 1 of the Act, indicates two broad classifications One is an establishment which is a factory engaged in any scheduled industry and the other is " any other " establishment, which would mean one which may not be of the nature of a factory engaged in any specified industry. The requirement which is common to both sub-clauses of sub-section (3) is that the establishment to which the Act applies or is made applicable should employ 20 or more persons. The power conferred by sub-section (3) (*b*) accordingly enables the Government to apply the Act to any establishment, though it is not a factory and is not engaged in any scheduled industry, but which employs 20 or more persons. The term 'establishment' is not defined in the Act and must to my mind, take its meaning from the context in which it appears, that is to say, the purpose underlying the Act The Act itself was made for the purpose of providing for the institution of Provident Fund for employees in factories and other establishments The dominant intention expressed both by the Title as well as the contents of the Act would thus appear to be that it is enacted in the interests of employees in esablishments not below a particular size. The question is whether, as contended by the petitioner, the Act cannot be made applicable to institutions like the petitioner club.

The notification issued by the Central Government was made in the exercise of the powers conferred by section 1, sub-section (3), clause (*b*) and the relevant part reads:

> "The Central Government hereby specifies the following classes of establishments in which 20 or more persons are employed as the establishments to which the Act shall apply with effect from, namely —
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> * * * * *
>
> (2) Societies, clubs or associations which provide board or lodging or both, or facilities for amusement, or any other service to any of their members or to any of their guests on payment "

That the petitioner club conforms to the description contemplated in clause (2) of the notification is not in dispute The objection raised is more fundamental, namely, that the Act was not intended to be made applicable to clubs of this description, that is to say, clubs which are non-commercial. Mr A K Sreeraman, learned Counsel for the petitioner, makes a distinction between proprietary and non-proprietary, clubs. Where a person is the owner of a club and provides facilities of the kind mentioned in clause (2) of the notification, such a person runs the club with a profit motive and runs it as a commercial venture On the other hand, where an association is formed of members only and the club, though incorporated and becoming a legal person, as distinct from the members, provides amenities and facilities to its members, it does not do so as a commercial proposition While the first class of club may be susceptible of being brought within the scope of the Act, the second class is not, so it is argued

Even at the outset, it may be pointed out: whether it is a proprietary or non-proprietary club, so far as the employees of either institution are concerned, they stand on the same footing, and if the intent of the Legislature was to provide some measure of relief to employees, there can in principle be no distinction between the two kinds of establishments

It is no doubt true that the activities of clubs of this kind, in so far as they provide refreshments and other service at a price to their own members, have been held not to come within the scope of the business of a dealer for the purpose of the sales tax It has also been held that they do not also come within the scope of the Catering Establishments Act But are these decisions conclusive on the question in the light and for the purposes of this Statute ? It seems to me they are not.

As I said earlier, the expression 'establishment' has not been defined. It is capable of a variety of meanings and where such an expression in common use is embodied in a Statute that particular aspect of the meaning of that expression which conforms to the underlying object and policy of the Statute should be adopted. Unlike other Acts where either the expression 'establishment' or other words analogous thereto are used in conjunction with such expressions as 'in the course of business or trade', in this particular Act, the word 'establishment' is not qualified in any way It only means an organisation which employs a certain number of persons and nothing more As I have pointed out, there exists only a broad classification between an establishment of the nature of a factory engaged in an industry and all other establishments It is the attempt of Mr Sreeraman, learned Counsel to induce me to hold that "any other establishment" occurring in sub-section (3), clause (*b*), must take its colour from clause (*a*) The question is whether that would be a proper mode of interpretation In *State of Bombay* v. *Hospital Mazdoor Sabha*[1], the question arose whether hospitals could be brought within the definition of industry, and it was argued that the rule of construction required that when two or more words which are susceptible of analogous meaning are coupled together, they should be understood to be used in their cognate sense The argument was that certain essential features are invariably associated with the words 'business' and 'trade' and the colour of these attributes would also be taken by other words used in the definition, though their normal import might be wider This argument was advanced in relation to the definition of the word 'industry' occurring in section 2 (*j*) of the Industrial Disputes Act But their Lordships point out that this rule of construction cannot prevail where it is clear that words of wider connotation have been deliber-

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1 1960 S C J 679 (1960) S C R 866 A I R 1960 S C 610

rately used in the definition in order to make the scope of the definition correspondingly wider and that this rule cannot be applied when the object of the Legislature is wholly free from ambiguity.

In *Mohammad Ali* v. *Union of India*[1], a notification issued under section 1 (3) (*b*) of the Act bringing within the scope of the Act hotels and restaurants was attacked. Their Lordships repelled the contention that the power conferred upon the Government was uncontrolled and uncanalised They proceeded to point out that the underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments. The wide scope of the Act and the intention underlying this social piece of legislation were briefly referred to in meeting that argument.

I am not convinced of the soundness of the argument of the learned Counsel that having regard to the previous history of this enactment and the changes it has undergone, it was always the intention of the Legislature only to apply it to establishments in the nature of business undertakings. From the point of view of persons who were to be benefited by this piece of legislation, I am unable to agree with the learned Counsel that the operation of the Act could be limited in that manner. I accordingly hold that the notification is not beyond the power conferred by section 1 (3) (*b*) of the Act.

The petition fails and is dismissed, but there will be no order as to costs.

S.V.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Appachan *alias* Girigori and others . *Petitioners**

v.

R. Raju Gowder .. *Respondent.*

Criminal Procedure Code (*V of* 1898), *section* 437, *proviso* (b)—*Jurisdiction to direct enquiry in respect of offences not triable exclusively by Sessions Court—"Other offence" meaning of—Scope and construction of proviso* (b) *of section* 437.

Under Proviso (*b*) of section 437, Criminal Procedure Code, the Sessions Judge or the District Magistrate may direct further enquiry where the evidence shows that "such other offence" that is, offence other than one triable exclusively by the Court of Session has been committed In the case of "such other offence" there could not be any question of direct commitment and that is why further enquiry is contemplated A limitation that the words "some other offence" occurring in the proviso must also relate only to an offence triable exclusively by the Court of Session should not be placed either as a matter of construction or on the reason of the thing The words are so general that they are sufficient to embrace offence, not triable exclusively by the Court of Session and the Sessions Court has jurisdiction to order further enquiry in respect of some offences.

Kallu v *Emperor*, A I R 1934 Oudh 327 and *Baijnath Pandey* v *Gouri Kanta Mandal*, I L R 20 Cal 633, considered.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Additional Sessions Judge of the Court of Session, Coimbatore Division at Coimbatore, dated 12th April, 1964, and made in Crl R P No. 2 of 1966 (P R C. No 20 of 1965 on the file of the Court of the Sub-Magistrate (J), Coonoor).

T M. Kasturi and *R Natarajan* of *Jan and San*, for Petitioners.

The Court made the following

ORDER.—This Revision Petition under sections 435 and 439, Criminal Procedure Code, has been preferred by the three persons who were accused in P R.C. No. 20 of 1965 on the file of the Sub-Magistrate, Coonoor. The Police filed a charge-sheet against them for offences under sections 392, 394, 397 and 392 read with section 114, Indian Penal Code. It will be noted that section 397, Indian Penal Code, is an offence triable exclusively by the Court of Session That was why the case was

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1 (1964) 1 S C J 329 A I R. 1964 S C 980

*Crl R C No 838 of 1966 and Crl R P No 822 of 1966 — 18th July, 1966.

taken on file as a Preliminary Register Case, to be enquired into under the provisions of Chapter XVIII of the Code.

Briefly the case of the prosecution was that at the instance of one Menon, P.W.1 Raju Gouder, owner of a big coffee and tea estate, employed the third accused as a writer in that estate For unsatisfactory work and absence without leave, his services were dispensed with in or about July, 1965 Accused 1 and 2 are uncles of the third accused On 6th October, 1965, at about 8-30 A M., the third accused came to the bungalow of P W. 1. Accused 1 and 2 demanded the settlement of the accounts of the third accused. P W 1 wanted Menon to be sent for. At that time the second accused caught hold of P Ws. 1's hand , and the first accused took out a knife and pointed it towards his chest saying that unless he settled the account of the third accused, he would be murdered. P.W.1 promised to settle the account Accused 1 and 2 pulled him out of the chair, took him to another room and pushed him down P.W.1's shirt was torn. At that time P.W. 1's daughter-in-law (P W. 4) came and protested. The first accused caught hold of her, but she went out. She asked the driver of the motor-car to go to the Police Station and report. But the three accused themselves got into the car and went away. P.W. 1 had kept cash of Rs. 10 and some change and a key. - The first accused took them away, and the second accused took away the account book. The Sub-Inspector of Police, Coonoor, came within about half an hour and recorded the complaint of P W. 1, Exhibit P-1. He recovered the torn shirt of P.W. 1 (M.O 1) and also, seomtime later, his dhoti (M.O. 2). P W. 1 was sent to the hospital. He had some injuries on his elbow, hip, leg and head.

The prosecution examined, besides P Ws. 1 and 4, P.W. 2 Nanjan, the servant of P W. 1, and the driver of the car, P.W. 3 The learned Sub-Magistrate, without examining the other witnesses, and without questioning the accused, discussed the evidence in detail and held that the case was grossly exaggerated and, indeed, false, bristling with vital discrepancies, and that it would be, therefore, sheer waste of time to commit the accused to the Court of Session. He consequently discharged the accused under section 207-A (6), Criminal Procedure Code.

Raju Gouder (P.W.1) preferred a petition under sections 435 and 437, Criminal Procedure Code, to the learned Sessions Judge. The learned Sessions Judge heard the petition after giving notice to the accused He pointed out that the learned Sub-Magistrate had grossly exceeded his powers in respect of a case triable exclusively by the Court of Session, and usurped the functions of the Sessions Court, indulging in special pleading for the accused The learned Sessions Judge further pointed out that there was sufficient *prima facie* evidence against the accused and that the learned Sub-Magistrate was wrong in holding that no case had been made out at all against the accused It is better to quote the relevant portion from paragraph 17 of the judgment of the learned Sessions Judge :

" P W 1 seems to be a respectable witness owning considerable amount of properties and also of a certain standard of status and literacy Within a short time after the occurrence a complaint has been made to the Sub-Inspector of Police wherein the trespass of all these accused and the overt acts committed by them have been made mention of P W 1 has also been sent to the doctor for medical examination and the doctor has found some injuries on his person which are described in his certificate. A torn shirt and a dhoti (M Os.1 and 2) have been seized by the Sub-Inspector in the course of investigation in the case Unless some incident had taken place in the house of P W 1 on that morning, it is highly improbable if a witness of the status of P W 1 would concoct a false story against the accused with ulterior motives The evidence of P W 1 about all these accused coming to his house and some incident happening therein is corroborated to some measure by the evidence of P Ws 2 and 4 Though P W 4 is the daughter-in-law of P.W 1, I do not think that merely in order to foist a false case on the accused P W 4 would leave the portals of her house and come into public gaze and criticism by figuring as a witness in the case I do not also think that a man of P W 1's position would have been a willing party to make his own daughter-in-law a participant in his nefarious scheme if the case was really a concocted one Similarly though P Ws 2 and 3 are employees of P W 1, it cannot be said that merely because they are employees of P W. 1, they can be branded automatically on that score as suborned witnesses Above all, it is unbelievable that in order to foist a false case, P W 1 would have been found to have some injuries by the doctor who examined him P W 1 is found to be a fairly old person aged about 70 years and this mature age of P W 1 and his status in life go a long way to discredit the contentions of the accused that the case against them is a foisted one In such circumstances, there is certainly evidence of a *prima facie* case against the accused and the Sub-

Magistrate has not come to the proper conclusion in holding that no case has been made out against the accused and that they are entitled to be discharged " . . .

At the same time the learned Sessions Judge felt that on the evidence on record the offence of robbery as defined in section 390, Indian Penal Code (which is the foundation of the offences under sections 392, 394 and 397, Indian Penal Code) had not been made out, and that all that had been made out was a separate house trespass punishable under section 448 or 451, Indian Penal Code, theft in a building under section 380, Indian Penal Code, and causing simple hurt under section 323, Indian Penal Code The brief point of the learned Sessions Judge was that the threat with the knife was only to settle the account of the third accused and not for committing the offence of theft of the cash or the account book Similarly, the hurt also was not caused for committing theft. The learned Judge felt that in the interests of justice the case should be enquired into further, the remaining witnesses also being examined The case was, in his opinion, one directly covered by proviso (*b*) to section 437, Criminal Procedure Code Since the Police considered the case to be sufficiently grave, the learned Judge directed that the further enquiry should be done by a Magistrate of the First Class, as indicated by Anantanarayanan, J., in *Hirudayasami Udayar* v *Ramaswami Nainar*[1].

As already stated, this revision petition has been preferred by the three accused. The first point taken by the learned Counsel, Sri T.M Kasturi, is that the learned Judge had no jurisdiction at all to order further enquiry into the offences under sections 451, 380 and 323, Indian Penal Code, when he had agreed that the offence under section 397, Indian Peanl Code, triable exclusively by the Court of Session had not been made out This question turns upon the scope of proviso (*b*) to section 437, Criminal Procedure Code But it is necessary, for the sake of completeness, to quote the relevant portions of sections 436 and 437, Indian Penal Code:

" *Section* 436 —On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrate subordinate to him, to make , and the District Magistrate may himself make or direct any subordinate Magistrate to make further enquiry into any complaint which had been dismissed under section 203 or sub-section (3) of section 204, or into the case of any person accused of an offence who has been discharged .

Section 437 —When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Sessions and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh enquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged

Provided as follows

(*a*) .

(*b*) that if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to enquire into such offence "

Now, there can be no doubt that, with respect to the offence under section 397, Indian Penal Code, mentioned in the charge-sheet, the learned Sub-Magistrate had grossly exceeded his powers and usurped the functions of the Sessions Court, indulging in special pleading for the accused Some of the propositions of law laid down by the Magistrate are, indeed, startling I am mentioning this only to show that the learned Sessions Judge examined the record primarily from the point of view of section 437, Criminal Procedure Code, and therefore he was entitled to invoke proviso (*b*) thereto It may be noted that the proviso (*b*) to section 437 speaks of ' some other offence' which, having regard to the main provision, would *prima facie* mean an offence not triable exclusively by the Court of Session It may be noted that the main provision contemplates the Sessions Judge or the District Magistrate directly passing an order of committal instead of directing a fresh enquiry, and in that sense section 437 goes further than section 436, which only empowers the Sessions Judge or the District Magistrate to pass an order for further enquiry Proviso (*b*) to section 437 is a proviso to the main portion of section 437 in the sense that, instead of passing a direct order of committal, the Sessions Judge or the District

1. (1961) 1 M.L.J 285 (1961) M L J (Crl) 192

Magistrate may direct further enquiry where the evidence shows that 'some other offence', that is, offence other than one triable exclusively by the Court of Session has been committed In the case of such 'other offence' there could not be any question of direct commitment, and that is why the further enquiry is contemplated. It is not necessary, or even possible to consider the full scope of proviso (*b*) and whether it will apply to any situation other than that which has arisen in the present case. It is sufficient to say that the wording of the proviso is apt to cover the present case and to empower the learned Sessions Judge to pass the order which he has done.

Sri T. M Kasturi contends, however, that the words 'some other offence' can only mean an offence triable by the Court of Session, but other than the particular offence exclusively triable by the Court of Session and mentioned in the charge-sheet and for which the enquiry was held In other words, the offence enquired into here was one under section 397, Indian Penal Code, triable exclusively by the Court of Session, and if the Sessions Judge found that some other offence triable exclusively by the Court of Session had been committed, he could have acted under the proviso, but since the offences which he thought had been committed were not offences exclusively triable by the Court of Session, but triable by a Magistrate also, the proviso would not apply. The learned Counsel justifies this interpretation by pointing out that the main provision of section 437 deals with a case triable exclusively by the Court of Session, and that therefore the content of the proviso must also relate only to an offence triable exclusively by the Court of Session. I, however, see no reason why either as a matter of construction or on the reason of the thing, such a limitation should be placed on the words 'some other offence' occurring in the proviso. The words are so general that they are sufficient to embrace offences, as in this case, like the ones under sections 451, 380 and 323, Indian Penal Code, not triable exclusively by the Court of Session.

A further important circumstance that compels me to hold against the learned Counsel's submission is that the acceptance of that submission would involve the result that there is a lacuna in the Code in respect of the situation which has arisen in this case, and that, even though on the merits it has to be held that the learned Sub-Magistrate has acted perversely and his order has resulted in injustice to the prosecution in respect of the offences under sections 451, 380 and 323, Indian Penal Code, without a fair enquiry, the Court is powerless to interfere and rectify the mistake The Court should not adopt a construction which would result in such a lacuna

The learned Counsel has, however, invited my attention to Note 13 to the Commentary to section 437 in the A I.R. Commentary:

> "The 'other offence' which, in the opinion of the Sessions Judge or District Magistrate has been committed, must be one exclusively triable by a Court of Session, otherwise the Court cannot order an enquiry into that offence under this section"

As authority the case in *Kallu* v *Emperor*[1], is cited. That case, however, does not support the proposition laid down in the Commentary That was a case where the charge-sheet was laid under section 304, Indian Penal Code, before the learned First Class Magistrate. It will be noted at the outset that the offence under section 304-A is triable both by a First Class Magistrate and by the Court of Session, so that it is not an offence triable exclusively by the Court of Session. A charge was framed by one Magistrate and he was succeeded by another Magistrate There was a *de novo* trial and an order of discharge was passed by the succeeding Magistrate Since the charge had been framed, really the order should have been one of acquittal. But, apparently, the succeeding Magistrate thought that because there was a *de novo* trial the previous trial had been also wiped out. The learned District Magistrate, acting under section 437, Criminal Procedure Code, ordered further enquiry. Against this a revision petition was preferred to the High Court Nanavutty, J., set aside the order of the District Magistrate and ordered the proceedings against the accused to be dropped The reason was that, though the order of the trying Magistrate was in form one of discharge, it was really an order of acquittal, and the

1 A I R 1934 Oudh 327

District Magistate could have no power to set aside the order of acquittal and order further enquiry. It is only the High Court which can do so under section 439, Criminal Procedure Code.

The other reason given was that, section 304-A, Indian Penal Code, was not an offence triable exclusively by the Court of Session and therefore section 437, Criminal Procedure Code, did not apply and the test to be applied was the one which would apply in a case triable by the Magistrate and in such a case the Magistrate was empowered to discuss the evidence, in such a case the Magistrate had power to appreciate the evidence and come to a conclusion on the truth or falsity thereof, whereas, in the case of an offence triable exclusively by the Court of Session, he could not usurp that power of appreciating the evidence, but must commit the case to the Court of Session if there was a *prima facie* case. Now, in the particular case, the learned District Magistrate had not shown how the order of the trying Magistrate was liable to be set aside according to this standard of wider power of the Magistrate. So far as I can see, this decision does not lay down anything to support the proposition laid down in the Commentary, and repeated before me by Sri T.M. Kasturi, that the words ' other offence' in the proviso (*b*) to section 437, Criminal Procedure Code, must mean offences exclusively triable by the Court of Session.

The learned Counsel cited the decision in *Baijanath Pandey* v. *Gouri Kanta Mandal*[1], a decision under the provisions of the Criminal Procedure Code, Act X of 1882. A complaint was made before a Magistrate, including a charge of dacoity triable exclusively by a Court of Session The Magistrate found that no case of dacoity had been established *prima facie*, but framed charges under sections 380 and 448, Indian Penal Code—theft in a building and criminal trespass—triable by him. He heard the whole evidence and acquitted the accused under section 258, Criminal Procedure Code, and sanctioned prosecution of the complainant. The complainant applied to the Sessions Judge for revocation of the sanction. The Sessions Judge felt that a proper enquiry had not been made into the case of dacoity and ordered further enquiry. Against that a revision petition was preferred to the High Court. The learned Judges held that the Sessions Judge had exceeded his powers as he had virtually set aside the order of acquittal in respect of charges triable by the Magistrate. It will be noted that the present case is distinguishable on the facts from the case quoted because the learned Sub-Magistrate here did not purport to try the case even for the offences under sections 451, 380 and 323, Indian Penal Code, and acquit them. I should not, however, be taken as having assented to the decision in so far as it does not specifically consider one aspect of the matter, namely, the power of the Sessions Judge to order further enquiry in a case triable by the Court of Session if he felt that in respect of that charge, the Magistrate had exceeded his powers.

I am, therefore, of the opinion that the order of the learned Sessions Judge directing further enquiry under sections 448 or 451, 380 and 323, Indian Penal Code, cannot be assailed on the ground of want of jurisdiction.

The next question is whether his order was proper on the merits and should be interfered with. On this aspect of the matter, the learned Counsel has invited me to consider the question from the point of view that, the learned Sessions Judge had agreed that the evidence had not made out a *prima facie* case under section 397, Indian Penal Code, but had made out only a case under sections 451, 380 and 323, Indian Penal Code, and that consequently the Magistrate had wide powers of appreciating the evidence and discharging the accused in the light of the discrepancies mentioned by him. As a proposition of law, I doubt whether such an approach could be made, because the fact remains that the learned Magistrate did not purport to proceed on any such basis that he was enquiring into the offences triable by him exclusively. Secondly, his order is couched in such unsupportable terms that it cannot be said by any means to be a fair or impartial enquiry even of the charges

1. I.L.R. 20 Cal. 633.

under sections 451, 380 and 323, Indian Penal Code. The points indicated by the learned Sessions Judge in paragraph 17 of his judgment, which I have already quoted, certainly show that a *prima facie* case had been made out to justify further enquiry into the offences under sections 451, 380 and 323, Indian Penal Code. I feel that it is not desirable that I should say anything more at this stage, because it would still be open to the Magistrate, who is to make the further enquiry, to discharge or acquit the accused, if, on a fair consideration of the evidence, he finds that no case has been made out against the accused, for framing charges or for convicting, as the case may be.

I feel that there is no jurisdiction for me to interfere and accordingly I dismiss the petition.

S.V.J. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN

Sengalani Gramani . *Petitioner**

v.

Subbayya Nadar and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 8-A—Impleading party—Suit in ejectment—Property in suit being agreed to be sold to defendant by its former owner—Plaintiff having knowledge—If former owner a necessary of proper party.

In a suit by the plaintiff for recovery of possession of a property from the defendant on the basis of the plaintiff's title the defendant cannot seek to implead the plaintiff's vendor as a party to the suit on the ground that the property was agreed to be sold to him and that the plaintiff had notice of such an agreement The proper remedy of the defendant, if any, will be to enforce his agreement with the plaintiff's vendor and apply for stay of the proceedings in the plaintiff's suit for possession.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Principal District Munsif, Poonamallee, dated 21st March, 1966, and made in I.A. No. 1544 of 1965 in O.S. No. 443 of 1964.

R. Subrahmanyam, for Petitioner.

The Court made the following

ORDER :—This revision petition has been filed against the order of the learned District Munsif, Poonamallee, dismissing the application which the petitioner filed in the suit as defendant for impleading one Ranganatha Mehta as the 2nd defendant in the suit. The suit was brought by the plaintiff against this petitioner for declaration of his title to Schedule 'A' and for recovery of possession of a portion thereof mentioned as Schedule B in the plaint. The basis of the application of the petitioner was that Ranganatha Mehta from whom the plaintiff had purchased the property had agreed to sell the Schedule A property to the defendant and that the plaintiff had notice of that agreement. The application was filed by the defendant under Order 8-A, Civil Procedure Code. The learned District Munsif in dismissing the application pointed out that there was no question of indemnity or contribution sought to be recovered from Ranganatha Mehta and therefore Order 8-A did not apply. In this petition Sri R. Subrahmanyam, learned Counsel for the petitioner, urges that though Order 8-A as such will not apply, Ranganatha Mehta could have been impleaded under Order 1, rule 10, Civil Procedure Code. But I do not think that it is necessary to implead him even under Order 1, rule 10, Civil Procedure Code The reason is that, as the Privy Council have indicated as early as 1934 in *Pir Bakhsh* v. *Mahomed Tahar*[1], the alleged right of the defendant under the agreement of sale cannot be a valid defence to an action in ejectment and that the only means by which the defendant can work out his right is to file a separate suit for specific performance of the alleged agreement of sale impleading Ranganatha Mehta and the plaintiff and apply for stay of trial of the suit in ejectment pending the trial of the suit for specific performance. The learned District Munsif is wrong in thinking that the truth of the agreement of sale could be gone into in the present

1. (1934) L R. 61 I A 388 6 J M L J 865 I.L R. 58 Bom. 650 (P C).

*C R P No 1505 of 1966 5th August, 1966.

suit as a valid defence and without Ranganatha Mehta being impleaded. For the reasons mentioned above, Ranganatha Mehta is neither a necessary nor a proper party. Accordingly this petition is dismissed.

R M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K. S. VENKATARAMAN

R. Kothandapani *Petitioner**

Criminal Trial—Accused initially pleading not guilty—Prosecution witness examined—Accused pleading guilty later by filing a memorandum admitting the offence—If could be convicted on such plea—Such a person if could be examined as prosecution witness against a co-accused

Under the Code of Criminal Procedure relating to trial of offences, while it is open to a Magistrate to accept the plea of 'guilty' of an accused and convict him on his own admission if such admission has been put forward at the initial stage, there is no provision under which a Court can accept such a plea and base a conviction on that, when once the prosecution evidence has been let in and the trial has commenced.

Quaere Whether a person who has been convicted on his own plea of 'guilty' after the commencement of prosecution evidence can be examined as prosecution witness against a co-accused ?

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate (J), Tiruchirapalli, dated the 29th day of July, 1966 and made in C.M P No. 221 of 1966 in C C. No 182 of 1966.

S. M. Ali Mohammed and *B Gopinath*, for Petitioner.

K. A Panchapagesan, for the Public Prosecutor on behalf of the State.

The Court made the following

ORDER :—In this case the charge was filed by the Police against three accused. One of them pleaded guilty even at the outset as soon as the charge was framed. He was duly convicted Another S R Subramanyam initially pleaded not guilty. But after some of the prosecution witnesses were examined he filed a written memorandum admitting the offence and pleading guilty. He was convicted on his plea on 25th June, 1966, and was released under section 4 (1) (*a*) of the Central Probation of Offenders Act. Thereafter he was cited as a prosecution witness against the remaining accused Kothandapani. Kothandapani filed an application before the Additional First Class Magistrate to set aside the conviction of S. R Subramanyam on 25th June, 1966, and objecting to his examination as a witness. It would appear that it was brought to the notice of the Magistrate that according to the judgments of this Court in C. A. Nos 231 and 383 of 1966 it was not open to the Magistrate to have accepted the plea of 'guilty' of S. R Subramanyam after he had initially pleaded not guilty In that Judgment Sadasivam, J , has referred to a judgment of mine wherein I had taken the same view The learned Magistrate observed that it was not wrong for him to have accepted the plea of guilty of Subramanyam and that Kothandapani could not plead any prejudice on that account However he accepted the other objection and ruled that Subramanyam would not be allowed to be examined as a prosecution witnesses. Kothandapani has preferred this petition against the above order

Sri S M Ali Mohammed contends that in view of the decision of this Court referred to above, it was not open to the Magistrate to accept the plea of guilty of S R Subramanyam This is correct but I do not see how the petitioner (Kothandapani) can plead prejudice on that account or can ask this Court to set aside the conviction of Subramanyam Since the learned Magistrate has ruled that Subramanyam will not be examined as a prosecution witness, the petitioner cannot have any possible grievance Accordingly the petition is dismissed

R M. —— *Petition dismissed.*

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*Crl R C No 1021 of 1966 and Crl R P No 1002 of 1966 10th August, 1966

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M ANANTANARAYANAN, *Chief Justice*

Umsalma Bibi .. *Petitioner**

v.

R. Lakkia Gowder .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 2 (2) *and section* 14 (1) (*b*)—*Demolition—Eviction of tenants from building comprising of several door numbers or distinct tenements—If one application could be filed—Words and Phrases—' Building'—Meaning of*

The word 'building' has two distinct connotations, one in its ordinary usage and another in specific Statutes The definition of 'building' in section 2 (2) of the Madras Buildings (Lease and Rent Control) Act is a technical one and includes a part of a building In other words the statute makes a building equivalent to a tenament as ordinarily understood in law But this is not the connotation in ordinary usage where the unity of structure and its permanence are the normal factors

Where a landlord seeks to apply for eviction of tenants from a building, which though structurally one has separate door numbers and consists of distinct tenements, for demolition and reconstruction under section 14 (1) (*b*) of the Act he must file separate applications for each building or tenement as defined in the Act When such applications relate to a composite structure or edifice, though with distinct tenements, it will be proper to consider and dispose of them by a common judgment

(As no prejudice was caused however in the instant case by the filing of a single application against a number of tenants it was held that no interference in the exercise of revisional jurisdiction was necessary)

Petitions under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of Coimbatore dated 30th September, 1965, and made in C.R P No 47 of 1964 and 238 of 1964 respectively (R C A No. 110 of 1963 and 116 of 1963 respectively on the file of Sub-Court, Coimbatore—R C.O.P. No 57 of 1963 on the file of the District Munsif's Court and House Rent Controller, Coimbatore).

Aiyar and *Dolia*, *S Sundar* and *N. Varadarajan*, for Petitioner.

S. Mohan and *Chinnaswamy*, for Respondent

The Court made the following

ORDER :—These related revision proceedings involve a question of considerable interest, in the context of a proceeding by the landlord under section 14 (1) (*b*) of Madras Act XVIII of 1960 for recovery of possession of the building *bona fide* for demolition and reconstruction The facts themselves are not now in controversy, though they were in dispute in the Courts below. We may now take it as established that the landlord (here respondent) required this structure or entire building, consisting of several door numbers or distinct tenements, for demolition and reconstruction, so that he could therein house his own commercial undertaking, which is a radio business.

The Courts have found that the landlord was serious about his intention in this regard, that there is an approved plan (Exhibit A-1), and that this is a *bona fide* proposal by the landlord, who is now conducting the radio business in rented premises, to shift here after reconstruction of his own building The Courts have specifically found that this building, which relates to the application under section 14 (1) (*b*), is situate in an important business locality, and that, judged from the point of view of finance, preliminary steps, approval of concerned authorities etc the requirement of the landlord is *bona fide*

A ground of maintainability was urged in this form Though there are separate door numbers or tenements, as I have already indicated, the landlord filed a single application in respect of the entire structure, under section 14 (1) (*b*) of the Act. It was urged that this was unauthorised and illegal, and that there should have been distinct applications for each distinct door number or tenement, which is the subject-matter of a separate tenancy It has further been urged before me that distinct defences might be put forward by the concerned tenants, and that

*C R P Nos. 2373 and 2386 of 1965. 26th August, 1966.

conceivably, one such tenancy may be saved by the operation of section 14, sub-section (5), and not otherwise. Further, it is conceivable that other unrelated grounds, such as a ground of ' wilful default ' in payment of rent, might be included within the scope of one such tenement, but not another. Per contra the learned Revisional Authority pointed out the anomaly or absurdity that might ensue, " if eviction was ordered only in respect of one or two door numbers," which may happen, if independent petitions had been filed against each tenant on behalf of the landlord.

The point here is that the word ' building ' has two distinct connotations. One is the connotation in the ordinary usage of the English language, to which I shall presently refer The other is a connotation derived from section 2 (2) of Madras Act XVIII of 1960, which is a definition By virtue of this definition, ' building ' will mean or include a part of a building ' let or to be let separately ' In other words, the Statute embodies a technical definition, which makes ' building ' equivalent to tenement, as ordinarily understood in law.

But this is not the connotation in the usage of English, apart from a technical context. In *Stevens* v. *Gourley*[1], the learned Judge said:

" I may venture to suggest, that, by a 'building' is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time "

In other words, it is the unity of the structure and its permanence, which are normal factors in the connotation, according to English usage Also see the commentary in Stroud's Judicial Dictionary, Third Edition, Volume I, page 347, under the caption "Building" In *Moir* v. *Williams*[2], Esher, M R , said that this is always a question of degree and circumstances, but that the "ordinary and usual meaning is, a block of brick or stone work, covered in by a roof". In the Shorter Oxford Dictionary, the word has been defined as ' a structure, or edifice.'

As observed earlier, the connotation derived from the usage of the language appears to involve the factors of a permanent structure and the unity of that structure. In that sense, there can be no doubt that this was a single building though there are separate door numbers and distinct tenements for distinct tenancies. But, since the Legislature in its wisdom has thought it fit to substitute a technical definition for purposes of the Act, for the connotation derived from ordinary usage, I am clear that the landlord must file separate applications for each building or tenement as defined in the Act for purposes of section 14 (1) (*b*) of the Act. When they relate to the composite structure or edifice, though with distinct tenements, it will be proper to treat such applications together, and to dispose of them by means of a common judgment.

But the point is not this. The point is whether, in the present case, assuming that separate applications ought to have been filed, the fact that the landlord filed a comprehensive or composite application, has worked any prejudice to the tenants (revision petitioners). I am unable to see any prejudice whatever. As laid down by the Supreme Court in *R B Sugar Co.* v. *Rampur Municipality*,[3] even the question whether a word like "shall" used in a Statute is mandatory or merely directory, has to be determined after taking into account the factor of inconvenience or prejudice. I therefore hold that there is no justification for interference in revision in these cases, though I must equally make it explicit that, in my view, where a landlord makes an application under section 14 (1) (*b*) in respect of a ' building ' as defined in the Act, he must make a separate application in each such instance, though all these ' buildings ' may be within one structure.

The proceedings are dismissed However, in view of the great hardship that revision petitioners are bound to sustain, in the matter of finding alternative accommodation for non-residential business purposes, in a congested urban area, I direct

1. (1859) 7 C B N S 99 at 112
2. L R. (1892) 1 Q B. 264.
3 A.I R 1965 S C. 895

that they shall have time for nine months from this date for vacating the premises. The order will be enforced only if they do not shift elsewhere by that period.

No costs.

R M ——— *Proceedings dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE T. VENKATADRI

V. P. Arunachalam Pillai .. *Petitioner**

v.

The Revenue Divisional Officer, Koilpatti and another .. *Respondents.*

Madras Hereditary Village Officers Act (III of 1895), sections 7 and 8—Enquiry under—Procedure.

Constitution of India (1950), Article 226—Enquiry against Government servant—Principles of natural justice—What is

According to the procedure laid down under sections 7 and 8 of the Madras Hereditary Village Officers Act, as revised and amended, after the initial enquiry on the charges framed, the Revenue Divisional Officer should pass orders on the charges If, however, he considers that the punishment of removal or dismissal from service is called for he should arrive at a provisional conclusion in regard to the punishment which he proposes to impose on the village officer and the Village Officer should be called upon to appear before the Revenue Divisional Officer on a date fixed to show cause against the particular punishment proposed to be imposed Any representation made on that date by the Village Officer concerned shall be recorded and shall be taken into due consideration before the final orders are passed A failure to follow the procedure laid down under these sections will vitiate the order of punishment The failure to give an opportunity to the Government servant to show cause against the punishment proposed to be imposed after taking into account the gravity of the offence etc , will amount to a denial of reasonable opportunity.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the record in R.O.C B No. 684 of 1963 dated 15th February, 1963, on the file of the Revenue Divisional Officer, Koilpatti, and that of the District Revenue Divisional Officer, Tirunelveli, in R.O. C. No. Ql. 17872/63-G dated 19th August, 1963, and quash the said orders and made therein.

K. Kumaraswami Pillai, for Petitioner.

The Assistant Government Pleader, for Respondents.

The Court made the following

ORDER :—The petitioner who is the permanent Karnam of Narayanapuram village in Sankarankoil taluk filed this petition to quash the order of suspension of five years passed by the Revenue Divisional Officer, Koilpatti, in R O C B No. 684 of 1963 dated 15th February, 1963, and that of the District Revenue Officer, Tirunelveli, in R O.C No Ql. 17872/63-G dated 19th August, 1963, on the ground that he failed to attend the kist centres conducted by the District Revenue Officer, Tirunelveli, on 28th November, 1962 and 26th December, 1962 at Sivagiri camp, that he attacked his superior officers in his written explanation to the Tahsildar, Sankarankoil, dated 12th December, 1962, and that he is a non-resident in the duty village and he is residing at Vasudevanallur village.

The gravaman of the charge of the petitioner seems to be that he was not given a reasonable opportunity in the conduct of the enquiry conducted by the Revenue Divisional Officer, Koilpatti

The facts in the instant case reveal that on 17th January, 1963, charges were framed and an oral enquiry was fixed on 31st January, 1963, on the said date, the petitioner filed a written statement to the effect that he desired to examine the Tahsildar and the Revenue Inspector and wanted to send for the records especially

*W P. No. 1060 of 1963. 9th September, 1966.

the Register maintained under rule 8 of the Board Standing Orders to prove that he did not receive the summons in respect of the first charge, namely, that he failed to attend the kist centre conducted by the District Revenue Officer on 28th November, 1962 At the same time it was brought to my notice by the learned Government Pleader that the petitioner dispensed with the oral evidence But the petitioner now contends before me that he never waived for the production of the records to prove his case When the case was called on 15th February, 1963, the enquiry was conducted and closed On a consideration of the evidence placed before him, the Revenue Divisional Officer pronounced the punishment as mentioned above It is this procedure that, the petitioner contends, is not only faulty but also a fatal one to the conduct of the enquiry. The enquiry under sections 7 and 8 of Act III of 1895, as it originally stood, contemplated, is that where it is proposed to take action against a Village Officer, definite charges should be framed and communicated to him fixing a date to appear for an enquiry On the day set for the enquiry, he is required to put in a written statement for his defence and to state whether he desires an oral enquiry or only to be heard in person At that enquiry he can put forth his witnesses and he can cross-examine the witnesses who depose against him If there is any documentary evidence it should be properly proved After the completion of the enquiry, the person charged should be entitled to put in a further statement of his defence This was the original procedure contemplated under the Act Subsequently this rule has been enlarged and expanded by an amendment dated 7th January, 1957 According to the new procedure, as amended, after the enquiry referred to has been completed the Revenue Divisional Officer, shall pass orders on the charges If however he considers that the punishment of removal or dismissal is called for, he shall arrive at a provisional conclusion in regard to punishment which he proposes to impose on the Village Officer and the Village Officer shall be called upon to appear before the Revenue Divisional Officer on a certain date fixed by him to show cause against the particular punishment proposed to be imposed. Any representation made on that date by the Village Officer shall be recorded and shall be duly taken into consideration before final orders are passed I have to reiterate once again that the procedure contemplated under sections 7 and 8 of the Act was not followed. After the enquiry was closed on 15th February, 1963, what the officer should have done was that he should have passed orders on the charges framed against the petitioner If he comes to the conclusion that a punishment of removal or dismissal or suspension is called for, he should have called upon the petitioner and told him that he proposes to impose the intended punishment on him Then he should be called upon to appear before him once again on a certain date fixed by him to show cause against the particular punishment proposed to be imposed on him Any representation made on that date by the Village Officer shall be recorded and shall be duly taken into consideration before final orders are passed It is this last step that is lacking and absent in the conduct of the enquiry by the Revenue Divisional Officer The petitioner complains that he was not given a reasonable opportunity to contend that the charges framed on him do not merit the particular punishment meted out to him, that though he might be guilty of some misconduct, this was not of such character as to merit the heavy penalty of suspension for five years especially when he had put in a service of more than twenty years and that in any event, a lesser punishment could have been sufficient in his case I entirely agree with the learned Counsel for the petitioner when he contends that the procedure adopted by the Revenue Divisional Officer was not in accordance with the procedure contemplated by sections 7 and 8 of Act III of 1895. But what the learned Counsel for the State contends is that in the case of disciplinay proceedings the Court should be hesitant to question the validity of the orders It is true thas Lord Goddard in *Ex parte Fry*[1] stated that disciplinary powers should be beyond judicial control But in subsequent cases the Court of Appeal did not entirely agree with him The Court of Appeal was of the opinion that judicial control must be confined to cases where there was some

1. (1954) 1 W.L.R. 730.

complaint of real injustice. What is a reasonable opportunity is explained in *Khem Chand* v. *Union of India*[1], in which the Hon'ble Chief Justice S R Das delivered judgment on behalf of the Court thus. (*a*) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based, (*b*) an opportunity to defend himself by cross-examining himself or any other witnesses produced against him and by examining himself or any other witnesses to support his defence and finally (*c*) an opportunity to make his representations as to why the proposed punishment should not be inflicted on him which he can do only if the competent authority after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three major punishments and communicates the same to the Government servant.

It is this last stage that is lacking in the procedure adopted by the Revenue Divisional Officer. Even assuming that this is a minor or trivial technicality, it still goes to the root of the matter and leads to complete denial of justice to the petitioner It affects the fundamental procedure of justice The rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the Legislature under which they have to act and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be but in the light of the provisions of the relevant Act.

Therefore I am of opinion that since the enquiry conducted by the Revenue Divisional Officer is lacking in not giving a reasonable opportunity to the petitioner, the order of suspension must be and is quashed.

The Writ Petition is allowed No costs.

R M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

Gowrammal .. *Appellant**

v

Lingappa Gowder . *Respondent*

Civil Procedure Code (*V of* 1908), *sections* 37, 38, 47 *and Order* 21—*Money decree passed by District Munsif of* K—*Subsequent carving out of territorial jurisdiction of Court of* K *and constitution of separate Court of District Munsif at* H—*Application for execution filed in the Court of* H *without any order of transfer whether entertainable*

Where the Court which passed the decree continued to exist an order transferring the decree should be obtained from that Court before it could be put into execution in a Court which might subsequently come to have jurisdiction over the properties in suit, that is to say, the subject-matter.

Appeal against the Decree of the District Court, Salem, in C M A. No 41 of 1963—unnumbered R E P. No of 1962 of District Munsif's Court, Hosur, in O.S. No. 208 of 1962, District Munsif's Court, Krishnagiri

T. K. Subramania Pillai, S Sethuratnam and *R Shanmugham*, for Appellant.

T. V. Balakrishnan and *A. N. Vanchinathan*, for Respondent.

The Order of the Court was made by

Srinivasan, J —This Civil Miscellaneous Second Appeal comes before us at the instance of our brother, Venkatadri, J

1. (1958) S C J 497 : (1958) 1 M L.J. (S C.) 169: (1958) 1 An.W R. (S.C) 169.

*A.A.A.O. No. 162 of 1963. 16th September, 1966.

The respondent-decree-holder obtained a money decree on 22nd June, 1953, against the appellant in O S No. 208 of 1952 on the file of the District Munsif's Court, Krishnagiri It is common ground that in 1959, a certain area was carved out of the territorial jurisdiction of the Krishnagiri Munsif's Court and a separate Court of District Munsif with jurisdiction over that area was established at Hosur. The decree-holder sought to proceed in execution of the decree by attachment of an amount lying to the credit of the judgment-debtor in the Estates Abolition Tribunal Court, Salem This petition was rejected on the ground that the Court which passed the decree, District Munsif's Court, Krishnagiri, had not transmitted the decree to the Court of the District Munsif of Hosur, wherein it was sought to be executed. The decree-holder appealed. The learned Additional District Judge, relying upon the decision of the Supreme Court in *Ramanna* v *Nallappa Raju*[1], thought that the District Munsif's Court, Hosur, should be considered to be the Court which passed the decree, and in that view, set aside the order of the lower Court and held the execution petition filed by the decree-holder in the District Munsif's Court, Hosur, to be maintainable and directed its disposal on merits It may be mentioned here that on behalf of the decree-holder, it was also urged before the lower appellate Court that on a prior occasion, an execution petition had been filed in the District Munsif's Court, Hosur, to the maintainability of which no objection was taken by the judgment-debtor, and that the judgment-debtor should be deemed to have waived the objection to jurisdiction. But this point was not specifically dealt with by the lower Court.

This Second Appeal by the judgment-debtor challenges the correctness of the view taken by the lower appellate Court

When the matter was heard by Venkatadri, J , a decision of the Full Bench of this Court in *Rama Iyer* v *Muthukrishna*[2], was brought to his notice and it was urged that was weighty authority for the view that the execution petition was not maintainable, in the District Munsif's Court of Hosur without there being an order of the decreeing Court, the District Munsif's Court, Krishnagiri, transmitting the decree to the former Court, for execution As against this, the decision of the Supreme Court already referred to was relied upon, wherein the correctness of the Full Bench view of this Court was not subjected to examination But it was pointed out there that where a Court which has jurisdiction over the subject-matter, when the execution application is presented entertains it without an order of transfer from the decreeing Court, it would at the worst be only an irregular assumption of jurisdiction and not a total absence of jurisdiction and that if objection was not taken at the earliest stage, it should be deemed to have been waived After considering these and a few other cases, Venkatadri, J , thought that there was a conflict of decisions which required the matter to be heard by a Bench.

The short question is whether in the circumstances of the case, the execution petition could be directly filed in the Court of the District Munsif of Hosur without an order transmitting the decree by the executing Court, that is, the District Munsif's Court of Krishnagiri.

We may at this stage refer to the provisions of the Code relating to execution. Section 38, Civil Procedure Code, provides that the decree may be executed by one of two Courts, the Court which passed the decree or the Court to which it is sent for execution Obviously, a Court which does not possess either character cannot execute the decree. Section 39 provides that the Court which passed the decree may send it to another Court for execution in certain cases The normal venue for the execution of the decree is the Court which passed the decree, and this expression " the Court which passed the decree " has been given an extended defini-

1. (1956) S.C.J. 101 : (1956) 1 M.L.J. (S.C.) 71 : (1956) An.W.R. (S.C.) 71.

2. I.L.R. 55 Mad. 801 : (1932) 62 M.L.J. 687 (F.B.)

tion in certain circumstances. One is that indicated in section 37 (*b*). In a case where the Court of first instance which passed the decree has ceased to exist or to have jurisdiction to execute it, the expression "the Court which passed the decree" in relation to execution will include the Court which would have jurisdiction to try the suit, if the suit wherein the decree was passed was instituted at the time of making the application for execution in that Court. This section accordingly provides for two contingencies One is the Court which passed the decree has ceased to exist and the other that it has ceased to have jurisdiction to execute it. It is only in either of these two contingencies that another Court is deemed to be the Court which passed the decree and such a Court shall be that one which would have the jurisdiction to try that suit if the suit wherein the decree was passed was instituted in that Court on the date of making the application to execute the decree. Under section 42, the Court executing the decree sent to it is conferred with the same powers in executing such decree as if it had been passed by itself Section 41 requires that the Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or when it fails to execute it, the circumstances attending such failure This provision seems to us to be important in that it indicates that the Court which passed the decree has full control over the further stages of the execution of the decree Order 21 of the First Schedule of the Civil Procedure Code provides for the procedure in execution of decrees.

In the Full Bench decision *Rama Iyer* v *Muthukrishna*[1], the position was that after the passing of a mortgage decree by a Munsif Court, at a place *M*, there was a re-alignment of jurisdiction by reason of which the properties in suit, came to be located within the jurisdiction of the District Munsif's Court at *N* An application to execute the decree was made to the latter Court without obtaining an order for transfer of the decree from the former Court which still continued to exist. In this Full Bench case, the conflict between certain earlier authorities was considered, and it was pointed out that the view taken in *Subbiah Naicker* v *Ramanathan Chettiar*[2], had been overruled in *Seeni Nadan* v *Muthusami Pillai*[3]. The principle of this Full Bench decision is clearly that where the Court which passed the decree continued to exist, an order transferring the decree should be obtained from that Court before it could be put into execution in a Court which might subsequently come to have jurisdiction over the properties in suit, that is to say, the subject-matter So much is clear from this decision.

The question was considered in *Ramanna* v. *Nallappa Raju*[4]. In that case, a decree had been passed by the Subordinate Judge, Kakinada. Objection to execution was taken by some of the *ex parte* defendants on the ground that the *ex parte* decree against them was obtained fraudulently. It failed and these defendants filed the suit challenging the decree in the District Court, East Godavari, to which the Court of the Subordinate Judge, Kakinada, is subordinate. The question arose whether the suit was filed in a Court which had jurisdiction to execute the decree under challenge. Their Lordships observe thus.

"Section 38, Civil Procedure Code, provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The District Court, East Godavari, is neither the Court which passed the decree in O S No 25 of 1927 nor the Court to which it had been sent for execution But it is common ground that when the present suit was instituted in the District Court, East Godavari, it had jurisdiction over the properties which are the subject-matter of this suit. It is true that by itself this is not sufficient to make the District Court, East Godavari, the Court which passed the decree for the purpose of section 38 because under section 37 it is only when the Court which passed the decree has ceased to have jurisdiction to execute it that the Court which has jurisdiction over the subject-matter when the execution application is presented can be considered as the Court which passed the decree, and it is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court But does it follow from this that the District Court, East Godavari has no jurisdiction to entertain the execution application in respect of the decree in O S. No 25 of 1927 passed by the Subordinate Judge, Kakinada?"

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1 (1932) 62 M L J 687 : I L.R 55 Mad 801 (F B).
2. (1914) 26 M L.J 189 I L R. 37 Mad. 462 (F.B.).
3 I L R 41 Mad 821
4. (1956) S C J 101 (1956) 1 M.L J. (S C.) 71 : (1956) An.W R (S C) 71.

After referring to a long course of decisions in the High Court of Calcutta that the Court to which the jurisdiction over the subject-matter of a decree has been transferred is also competent to entertain an application for execution of the decree, reference is made to the Full Bench decision of the Madras High Court in *Rama Iyer* v. *Muthukrishna*[1], which view also finds support in another decision of the Calcutta High Court in *Mesrab Khan* v. *Dabunath Mali*[2]. But their Lordships of the Supreme Court found it unnecessary to decide which of those two views is correct, but proceeded to deal with the matter on the basis of a different principle. They refer to *Balakrishniah* v. *Lingarao*[3], where it was held that the Court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer and that if it entertains an execution application with reference thereto, it would only be a case of an irregular assumption of jurisdiction and not a total lack of it. They further say that if objection is not taken to such assumption of jurisdiction at the earliest opportunity, it must be deemed to have been waived, and that was the position in the case before their Lordships One point that emerges from this decision is the reiteration of the general principle of law that a Court acquires inherent jurisdiction over the subject-matter when that subject-matter is transferred to it in the sense of a transfer of territorial jurisdiction.

It would certainly appear from a consideration of this decision that if the subject-matter comes to be within the jurisdiction of the District Munsif's Court, Hosur, though the decree might have been passed by the District Munsif of Krishnagiri, the District Munsif of Hosur could acquire inherent jurisdiction to execute it. The question, however, is whether despite that fact, so long as the Court which passed the decree, that is, the District Munsif's Court, Krishnagiri, continued to exist the law does not require a transfer of that decree by the decreeing Court to the executing Court before the latter can proceed by way of execution. In a decision of a single Judge of the Punjab High Court in *Kasturi Ram* v. *Mehr Singh*[4], it was held that where the territorial jurisdiction of a Court is transferred to another Court, the transferee Court is competent to entertain directly an application for the execution of the decree passed by the first Court. The decree had been passed by the Subordinate Judge, Singrur, but by the alteration of territorial jurisdiction, the property came to lie within the jurisdiction of the Sub-Court, Sunam. The contention was advanced before the learned Judge that since the Singrur Court had ceased to have jurisdiction to execute the decree, it would necessarily have to transfer the decree to the Sunam Court for execution. The argument in the contrary was that the Singrur Court as the decreeing Court did not cease to have jurisdiction to execute the decree and that the requisite condition under section 37, Civil Procedure Code, was not fulfilled. The learned Judge observed that the object of section 37 was to give greater facilities to the decree-holder for executing his decree and thought that while an application for execution could always be entertained by the Court which passed the decree as provided under section 38, Civil Procedure Code, the decree-holder could in addition make his application to another Court if the original Court could not execute the decree within the meaning of section 37. A distinction was made by the learned Judge between jurisdiction to entertain an application for execution and the jurisdiction to execute a decree. He further thought that there could not be any case in which the Court of first instance continues to exist but deprived of jurisdiction to entertain an application for execution. The result of the discussion of the learned Judge was that the Sunam Court, thought it was not the decreeing Court and the decree was not transferred to it by the decreeing Court, could entertain and proceed with the execution. This view was approved by a Full Bench of the Punjab High Court in *Mehr Singh* v. *Kasturiram*[5].

1 (1932) 62 M L J 687 : I L R 55 Mad 801 (F B)
2 I L.R (1942) 1 Cal. 289
3 I L R 43 Mad 804
4 A I R 1959 Punj 350.
5 A.I R. 1962 Punj 394 (F B).

In *Gopalakrishna* v. *Lakman*[1] a situation closely similar to that in the present case arose. The territorial jurisdiction of the Subordinate Judge's Court of Mangalore was cut up and a new Court of Subordinate Judge was created at Udipi, and by a notification, it was directed that the former Court shall cease, with effect from a specified date, to exercise jurisdiction over the local limits defined for latter Court. Prior to that date, a money decree had been passed by the former Court and execution thereof was levied in the Court at Udipi. The learned Judge held that that could not be done unless the decree had been for execution by the decreeing Court and that neither section 38 nor section 37 of the Code deprived the Court which passed the decree of its jurisdiction to executed, it merely because a new Court was established.

. . We may observe here that though section 37 was intended to facilitate the execution of decrees, if the law were to be that both the decreeing Court and the executing Court could execute the decree, the latter without having the decree transferred to it by the decreeing Court, it may lead to certain anomalous situations. Normally, simultaneous execution of the decree is not countenanced by the processual law, and Order 21, rule 21, Civil Procedure Code, specifically declares that the Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor. If the decree-holder in circumstances analogous to those that obtain in the present case were to be permitted to approach either Court as he chooses, there is nothing to prevent him from filing an execution application in one Court for proceeding against the person of the judgment-debtor and another in the other Court for proceeding against the property of the judgment-debtor, and if the transfer of the decree is not to be insisted upon, neither Court would be aware of this act on the part of the decree-holder, and the exercise of the Court's discretion in permitting or refusing such simultaneous execution may well be designedly avoided by the decree-holder. This appears to be an argument in favour of the view that when the executing Court is not the decreeing Court, the decree should be transferred to it by a proper order of the decreeing Court.

It will be noticed that in all the cases where the newly constituted Court was held competent to execute the decree, even without transmission of the decree by the Court which passed the decree, the position was that the subject-matter of the decree came to be within the jurisdiction of the new Court. That, it was held, conferred inherent jurisdiction on the Court to levy execution against properties situated within the local limits of its jurisdiction. It is difficult to apply this principle in a case relating to the execution of a mere money decree.

We are accordingly of the view that *Rama Iyer* v. *Muthukrishna*[2], lays down the rule that should be followed.

We may however note that on an earlier occasion the decree-holder applied for execution in the Hosur Court. It is argued that on the ratio of the decision in *Ramanna* v *Nallappa Raju*[3], it is not open to the judgment-debtor to object to the present execution application, as he had not raised it previously and should be deemed to have waived it This ground was not examined by the Court below. Nor are any facts necessary for an examination of this ground available in the records. We therefore set aside the order of the lower appellate Court and remit the matter to the District Munsif's Court, Hosur, for disposal of the execution petition after giving a finding on the question of waiver of objections to jurisdiction. There will be no order as to costs.

V.S. ——— *Order set aside and case remitted.*

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1 A I R 1964 Mys 34
2 (1932) 62 M L J 687 I L R 55 Mad 801 (F.B).
3. (1956) S C J 101 (1956) 1 M.L J. (S C) 71 (1956) An. W R (S.C.) 71.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE K. S RAMAMURTHI.

Rathinam and three others .. *Petitioners**

v.

State S. I. of Police, Tiruvadanai (Crime No. 83 of 1966) .. *Respondent.*

Penal Code (XLV of 1860), *section* 366—*Abduction and kidnapping—Gist of offence under.*

The offence under section 366 of the Indian Penal Code lies in the act of kidnapping a minor girl or abducting a woman for the purpose of being compelled to marry against her will. Whether the marriage, if concluded, will be valid or not has nothing to do with the commission of the offence. The offence would be complete irrespective of the validity of the marriage that was gone through

Taher Khan v *Emperor*, I L R 45 Cal 641, Referred.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Magistrate, Tiruvadanai, dated 28th July, 1966, and made in Crl.M.P. No 316 of 1966 in P. R C No. 14 of 1966 and also against the order of the Court of the District Magistrate, Ramanathapuram at Devakottai, dated 16th September, 1966, and made in Crl. R P. No. 8 of 1966.

S. Parthasarathy, for Petitioners.

The Court made the following

ORDER —The petition has been filed on the ground that the complaint as given in the F.I.R. and the materials as gathered by the Police in the course of the investigation do not disclose an offence under section 366, Indian Penal Code, but, if established, may amount only to an offence under section 363, Indian Penal Code. The argument is that the facts, if proved, would amount only to an offence under section 363, Indian Penal Code, which is triable by a Court of Session, Presidency Magistrate or Magistrate of the First Class, and that the proceeding now before the Sub-Magistrate, Tiruvadanai, for committal of the accused to take their trial before the Court of Session for an offence under section 366, Indian Penal Code, is misconceived. According to learned Counsel, it is not a case which is exclusively triable by a Court of Session but it is one which is triable by a First Class Magistrate as well and therefore the Sub-Magistrate ought not to hear the proceeding, and the proceeding should be transferred to a First Class Magistrate having jurisdiction.

I see no substance in this argument, and I may also say that the arguments advanced by learned Counsel for the petitioner is not intelligible As I understood the argument, it is that a person sought to be prosecuted for an offence under section 366, Indian Penal Code namely, kidnapping or abducting a woman, with a view to compel her to marry against her wishes or will, must have kidnapped or abducted her for a valid marriage The argument in this case that a minor girl has been kidnapped, and under the Hindu Law a valid marriage cannot take place without the consent of the mother which is lacking in this case, and therefore even if the accused had not been intercepted in the completion of the wrong and even if a form of marriage had been gone through, it would not result in a valid marriage, and therefore no offence is committed under section 366, Indian Penal Code As I said, I see no substance in this contention. There is no warrant for this interpretation of section 366, Indian Penal Code. All that the section requires is that the minor girl or woman should be kidnapped or abducted, as the case may be, for the purpose of being compelled to marry against her will, and whether the marriage would be valid or not has nothing to do with the commission of the offence. A reference to the statement of the law and the cases referred to in Ratanlal's Law of Crimes, Eighteenth Edition, page 889 is sufficient to show that there is no substance in the contention. Learned Counsel for the petitioners drew my attention to a Bench decision of the Calcutta High Court, *Taher Khan* v *Emperor*[1], in support of his contention. Far from supporting the contention of learned Counsel, it is dead against him This

*Crl R.C. No. 1307 of 1966 Crl. R. P No 1279 of 1966 30th September, 1966.

1. I.L.R. 45 Cal. 641.

identical argument was advanced before the Bench, and the Bench rejected it, taking the view that the offence was complete whether the marriage which was gone through was legal and valid or illegal and invalid. The facts set out in the order of the Court below show that if the main facts and the complaint put forward in the F I R are proved, it would clearly amount to an offence under section 366, Indian Penal Code, in which case it is an offence which is exclusively triable by a Court of Session I have no hesitation in holding that the proceeding before the Sub-Magistrate is quite competent.

The Revision Case is dismissed.

R M — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A ALAGIRISWAMI

Raso Moopanar .. *Petitioner**

v.

T. K Ramamurthy Iyer .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955)—Intention and policy of Legislature—Power of Revenue Court under to order restitution—Order of Revenue Court set aside subsequently—Tenant evicted in pursuance of the Order earlier—If can seek restitution by way of redelivery of possession

Interpretation of Statutes—Tribunals entrusted with certain powers—Incidental powers—When permissible.

It is no doubt true that Revenue Courts under the Madras Cultivating Tenants Protection Act are not civil Courts and they cannot normally have any inherent powers as such apart from those specifically conferred on them by the statute creating them But even such Tribunals can be held to have certain powers by implication, even though not expressly conferred by the statute, where such powers are necessary for the proper and effectual performance of the work entrusted to them by the statute

The Madras Cultivating Tenants Protection Act is a piece of beneficial legislation intended to protect cultivating tenants from eviction A tenant who has been evicted from his holding in pursuance of an order of Court, which has been subsequently set aside, cannot be without a remedy to get back possession Though the Revenue Court has no inherent power to order restitution and though the Act does not confer such a power on the Revenue Court it is proper to infer that the Revenue Court would have the power to restore possession to the tenant who has been evicted in pursuance of an order, which has been subsequently set aside.

Petition under section 5 (*b*) of the Madras Act XXV of 1955 as amended by Act XIV of 1956 read with section 115, Civil Procedure Code, praying the High Court to revise the Order of the Presiding Officer, Revenue Court, Kumbakonam, dated 31st January, 1964, and made in P No. 1319 of 1963.

S Ramaswami and *R. Ganesan*, for Petitioner

K. Raman, for Respondent.

The Court made the following

ORDER —This is a petition under section 6-B of Madras Act XXV of 1955 to revise the Order of the Revenue Court, Kumbakonam, in P No 1319 of 1963 The tenant is the petitioner. The landlord filed the application under section 3 (4) (*a*) of the Act for eviction of the tenant on the ground of arrears of rent. The Revenue Court ordered the tenant to pay the arrears by 30th January, 1964, and to report to the Court on 31st January, 1964 The tenant actually paid the arrears of rent on 31st January, 1964, and on objection taken by the landlord, the Revenue Court refused to excuse the delay of one day in the payment of arrears and ordered eviction It appears that pursuant to the order of eviction the tenant has also been evicted.

The first question for consideration is whether the Revenue Court had the power to excuse the delay of one day in payment of the arrears of rent It has now been held by a Bench of this Court that the Revenue Court could do so, even when the original order provided for eviction on failure to pay the rent in time and even if the application to excuse delay is filed after the expiry of the period. There have been cases where when the matter came up on revision before this Court, this Court

*C.R.P. No. 393 of 1964. 13th October, 1966.

itself has excused the delay I consider that in the interests of justice, this delay of one day may be excused, and I hold accordingly

The next point is whether the tenant having been already evicted from his holding in pursuance of the order passed against him, he could get back possession of the property even if he succeeds in getting the order of eviction passed against him set aside. It is contended for the respondent that the Revenue Court not being an ordinary civil Court, has no power to order restitution. It is well-known that the power of a civil Court to order restitution is not wholly governed by section 144 of the Code of Civil Procedure The real basis for the power of Court to order restitution is that a person who has obtained benefit under an order of Court which is subsequently found to be wrong, should not be allowed to retain the benefit which he had obtained under the wrong order. As I mentioned already, it has been held that civil Courts have powers to order restitution even where the matter does not fall within the four corners of section 144 of the Code of Civil Procedure As regards Tribunals, though it is true that Tribunals have normally no power than those which the statute confers on them and the Tribunals have no inherent power as such, they have such powers as are necessary for their proper working . see *Zukeria Suleman* v. *Collector, Yeotmal*[1]. In that decision it was held that in order to facilitate and further the beneficient purposes of the enactment, even though no such power can be found in the express provision of the statute, the Court must by necessary implication hold that such a power exists The learned Judges referred to the statement of the law in Craies on Statute Law, 5th Edition, page 106, wherein it is observed :

"If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out "

The Cultivating Tenants Protection Act was a beneficient piece of legislation intended to protect cultivating tenants from eviction The Act goes so far as to provide in sub-section (5) of section 4 that any cultivating tenant who after the commencement of the Act has been evicted, except under the provisions of sub section (4) of section 3, shall be entitled to apply to the Revenue Divisional Officer within two months from the date of such eviction or within two months from the date of coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956, for the restoration to him of the possession of the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a cultivating tenant. This sub-section (5) was subsequently added by means of the Amending Act of 1956, though originally there was no such sub-section, presumably because it was thought that a cultivating tenant, who had been evicted from his land, except in pursuance of the Cultivating Tenants Protection Act, had other remedies open to him in order to get possession of the property from which has been illegally evicted. As the Act shows that the Legislature was so particular about protecting the rights of cultivating tenants, it would be reasonable to infer that the Legislature did not intend that a cultivating tenant who had been evicted from his holding in pursuance of an order of Court which is subsequently found to be wrong, should be left helpless and without any remedy to get possession of the holding from which he had been so evicted. I think that this is a case where the Court could legitimately infer that the Revenue Court would have the power to restore to the cultivating tenant possession of the holding from which he had been evicted in pursuance of its order which has subsequently been found to be wrong or is set aside. I hold therefore that there is a power in the Revenue Court to order restitution in cases where orders of eviction passed by it are subsequently set aside. The result in this case would be that the order of eviction passed by the Revenue Court is set aside and the tenant will be entitled to be restored to possession of the holding No costs.

The petition having been set down for being mentioned. The Court made the following

ORDER.—Restitution will be effected after the crops now on the land are harvested.

R.M. *Order set aside.*

1. I.L.R. (1962) Bom. 441 : A.I.R. 1963 Bom. 233.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K VEERASWAMI AND MR JUSTICE N. KRISHNASWAMY REDDY

Nathella Sampathu Chetty .. *Petitioner**

v

Sha Vajingjee Bapulal . *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (*a*)—Bona fides *of requirement under—Meaning of*

Section 10 (3) (*a*) (iii) of the Madras Buildings Lease and Rent Control Act, 1960, allows a landlord to apply to the Controller for an order directing a tenant to put him in possession of the building if the landlord is not occupying for purposes of business which he is carrying on a non-residential building which is his own If the conditions of the provisions are satisfied, the Controller may make an order as prayed for by the landlord provided he is further satisfied that the claim of the landlord is *bona fide* This requirement that the claim of the landhord should be *bona fide* is common not only to this provision but also to several other provisions in the Act which provide for eviction of tenants The expression *bona fide*, therefore, will have to be understood in the context, but subject to that, it means in cases under section 10 (3) (*a*), that the landlord honestly desires to occupy the peremises from which eviction is sought and his cliam is not a device to serve an oblique purpose

That the landlord has made certain allegations or claims in some earlier proceedings may neither be relevant nor could they affect his *bona fides* in a later claim so long as it is proved that the landlord honestly desires to occupy the premises for carrying on his business The fact that he owned several other buildings, which were not mentioned in the petition, is of no consequence as it is entirely open to a landlord to choose which building he would require for his business

So long as the evidence does not justify a finding that the claim is a device and is intended to serve an oblique purpose, it will go a long way towards the claim being honest In other words, when once it is clear that the claim is not a device very little evidence might be required to find that the claim is an honest one

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960 praying the High Court to revise the order of the Court of Small Causes (Chief Judge) Madras dated 31st March, 1966 and made in H R A No. 409 of 1962 (in H R C No 3215 of 1961 on the file of the Second Additional Rent Controller, Madras

K. C Jacob, S K L Ratan and *R. Rajagopalan*, for Petitioner.

V Venkateseshayya, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This petition arises from proceedings in eviction The petitioner applied at Madras for an order of eviction against the respondent from premises No. 176, Nethaji Subhas Chandra Bose Road The ground of the petitioner was that he was not occupying for the purpose of the business which he was carrying on a non-residential building in the City, which is his own and that he *bona fide* required the premises for his occupation The petition was resisted, but was ordered by the Rent Controller. The respondent's appeal was successful But this Court allowed the petition in revision and remitted the matter to the lower appellate Court for fresh disposal It has since come to the same conclusion as it did before and directed that the eviction petition should stand dismissed The matter is brought before this Court over again under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960.

While disposing of the appeal, the Court below rightly posed the point for its decision, namely, whether the landlord *bona fide* required the premises for his own occupation, but considered that the evidence on record did not establish *bona fide* on the part of the petitioner It referred to the allegations made by the petitioner in an earlier application to the State Government for exemption of the premises from application thereto of some of the provisions of the Act, which has since been superseded by Madras Act XVIII of 1960, and one or two other facts from the evidence, thought that in view of them the petitioner's claim for an order of eviction was totally inconsistent with his case in the earlier application, that he had suppressed a material

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*C.R.P. No. 1256 of 1956. 26th October, 1966.

fact, namely, he only admitted in his cross-examination that he had a building of his own situate opposite to the premises in question and that he had seven or eight other residential buildings spread over the city and fetching a large rent, that this made his evidence unreliable and that finally it was not the case of the petitioner that premises No 177, a portion of which he has been in occupation, is insufficient or too big for his business. The Court below on that process of reasoning concluded that though the petitioner was not occupying a building of his own for the purpose of his business, his claim was not *bona fide*.

It is argued before us that the approach made by the lower appellate Court is erroneous and vitiated its order. In our opinion, there is force in the contention. Section 10 of the Madras Buildings (Lease and Rent Control) Act, 1960, provides for eviction of tenants in certain circumstances. Sub-section 3 (*a*) (iii) of the section allows a landlord to apply to the Controller for an order directing a tenant to put him in possession of the building if the landlord is not occupying for purposes of business which he is carrying on, a non-residential building in the city, town or village concerned which is his own The second proviso to this clause is to the effect that where a landlord has already obtained possession of a building under this provision, he shall not be entitled to apply again for possession of another non-residential building of his own If the conditions of these provisions are satisfied, the Controller may make an order as asked for by the landlord provided he is further satisfied that the claim of the landlord is *bona fide*. It is not in controversy before us that the conditions of section 10 (3) (*a*) (iii) are satisfied and, therefore, the only question is, as was rightly posed by the lower appellate Court, whether the claim of the landlord is *bona fide* This requirement that the claim of the landlord should be *bona fide* is common to not only the provision under which the petitioner applied in this case, but also to several other provisions which provide for tenant's eviction The expression, therefore, will have to be understood in the context, but subject to that, it means that for present purposes the landlord honestly desires to occupy the premsises from which eviction is sought and his claim is not a device to serve an oblique purpose. That this is what is meant by *bona fide* has been held in *Motiram* v. *Suraj Bhan*[1], and in *Neta Ram* v. *Jiwan Lal*[2]. It seems to us that this test has not been kept in view by the lower appellate Court in recording a finding as to whether the claim of the petitioner was *bona fide*.

Nowhere in its order has the lower appellate Court found that the petitioner's claim was a device to apply the premises to an oblique purpose But it considered that the claim was not *bona fide* because in its view the petitioner had put forward inconsistent cases before the Government and the Rent Controller We do not think that in the circumstances the allegations made by the petitioner in his earlier application to the Government affected the *bona fide* in his present claim. Indeed, it does not appeal that those allegations are even relevant in that context. In that application which was made by the petitioner by his name, he alleged that he was the *pater familias* as the head of a large family belonging to one of the foremost business communities, that in partnership with his son he was carrying in the business of manufacturing jewellers and bullion merchants under the name and style of ' Nathella Sampathu Chetty & Son' at No. 177, Nethaji Subash Chandra Bose Road, Madras-1 and that they were also having a sister concern, a private limited company under the name and styley of "Nathella Sampathu Chetty Son & Co. (P) Ltd." in which himself and his family were members. He further stated that both the concerns carried on business in this premises having a large annual turnover and that as the turnover was steadily increasing and the space was insufficient not only to conduct the business, but also for the manufacturing side, the premises bearing No. 176, were required for their occupation There was also an allegation that in the event of getting possession of the building, namely premises No 176, the petitioner proposed to make the two buildings into one by making structural and other alternations to suit the needs of the business It appears that the private company was incorporated in 1952 and pre-

1. (1960) S.C J 699 : A I R. 1960 S.C. 655. 2 A.I R. 1963 S C. 499.

mises No 177, which were owned by the petitioner at the time, were sometime later conveyed to the company. In June, 1959 the petitioner purchased the premises bearing No. 176 and the respondent thereafter attorned to him The petition to the Government was made in about July, 1960 The lower appellate Court took those allegations and comparing them with those in the present application thought that the claims were totally inconsistent In the present application what the petitioner stated was this He said that he was carrying on business in gold and silver for several decades at No 177 as the sole proprietor and in partnership, that in about 1952 he rearranged his business and had confined himself to gold and bullion trade and transferred his other business with all stock-in-trade, goodwill, premises etc., in favour of the private limited company consisting of his son and other relations and that, in the circumstances, as he has purchased premises No 176 and as he was not occupying a premises of his own for carrying on his business, he *bona fide* required the premises for his occupation We can find no inconsistency in these allegations except perhaps as to the kind of business the firm or the company was carrying on. In the earlier application what appears to have happend is that right or wrong, the petitioner mixed up the firm and the company and proceeded on the basis that all constituted one business of his and it was on that basis he wanted exemption of premises No. 176. In the present application also the petitioner claims that he wants the premises to carry on his business. Only he has not pursued his case in the earlier application to the Government that he wanted the premises also for the entire business including that carried on by the company We do not know on what ground the application to the Government was dismissed . But we can visualise that as the petitioner was occupying a rented premises, that would disentitle him to get the order he wanted from the Government. Whatever that be, it is open to the petitioner without throwing himself open to a charge of being dishonest to confine his claim to his business It is not in dispute that the petitioner is occupying a portion of the premises as a tenant of the company The question in the circumstances will be whether the petitioner honestly desires to occupy the premises bearing No. 176 for carrying on his business. If he has that desire, that is not rendered dishonest because of the allegations he had made in the earlier application. Those allegations do not necessarily negative the honesty of the petitioner in making the claim. Nor do we think that the allegation that he had made in the earlier application, namely, that when he gets possession of the premises, he would make the two buildings into one by making the necessary structural or other alterations to suit the needs of the said business necessarily affected or bore on the honesty of his present claim. The petitioner might legitimately, think of making alterations to the two buildings and at the same time after making the alterations and making the two buildings as one whole, occupy that part of the premises bearing No. 176. What we are concerned to point out is that there is nothing in the earlier allegations which were inconsistent with the claim of the petitioner being honest It has been suggested to us that the petitioner may possibly after getting possession of premises No. 176 allow the company to occupy the same. The lower appellate Court has not recorded any finding to that effect, nor has our attention been drawn to any evidence to establish it. We may observe in passing that if the petitioner made such a use of the building, the respondent will not be without a remedy, for the Act provides for such a contingency and enables the respondent to regain possession. In fact, the Act further provides for a penalty.

We can understand if the Court below had found that the petitioner had an oblique purpose to serve and claimed possession as a device to evict the respondent. Not only the Court below has not said a word abou, it but found that the claim was not *bona fide* merely in the light of the allegations which it considered to be inconsistent. The further circumstances which the Court below relied on, namely, that the petitioner had suppressed certain facts, does not also seem to have a bearing upon the question of *bona fides*. It is true that the petitioner could have well stated in his petition that he owned one other non-residential building and certain other residential buildings in the City. But the fact that he did not mention it, and it had to be elicited in his cross-examination does not mean that there was a suppres-

sion which cases doubt upon the *bona fides* of his present claim. The fact that he owned residential buildings has no relevance to his present claim and the non-mention of it in the petition is not, therefore, of any consequence. So far as the other non-residential building is concerned, the Act does not say that if the petitioner owned more than one building, he would not be entitled to an order of eviction. It was entirely open to the petitioner to choose which building he would require for occupation for carrying on his business It is not difficult to guess in this case the reason why he preferred premises No 176, the reason is it is adjacent to premises No. 177, where he is already carrying on business in a portion.

It is therefore, necessary that the appeal should be disposed of by the Court below afresh In doing so, it must keep in view the test of *bona fides* as pointed out earlier in this judgment. If the Court below finds that the evidence does not justify a finding that his claim is a device and is intended to serve an oblique purpose it will go a long way towards the claim of the petitioner being honest. But by this we do not say that because the Court is unable to find on the evidence that the claim is a device, it necessarily followed that the desire to occupy the premises is an honest one. That fact will also have to be established on the evidence. But once it is clear that the claim is not a device, very little evidence might be required to find that the claim is an honest one. These observations we consider should be borne in mind in deciding whether the petitioner's claim is *bona fide*. The petition is allowed and the matter is remitted to the Court below for fresh disposal in accordance with this judgment. The costs of this petition will follow the result of the appeal.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Jacob A Chakramakkal . *Petitioner**

v.

Nelliampathy Estate Labour Congress by
Secretary K. Chinnappa. .. *Respondent.*

Supreme Court Rules, 1950—Order 40, rules 25 to 30—Fees claimed by an Advocate other than an Advocate on record, for services rendered in connection with a case before the Supreme Court—If can be claimed by a separate suit

It is no doubt true that rules 25 to 30 of Order 40 of the Supreme Court Rules provided for taxing of costs by the taxing officer in disputes between an Advocate on record and his client in proceedings before the Supreme Court of India But the rules are applicable only to the Advocate on record and not to the Junior or Senior Advocates who cannot apply for taxation directly to the Court Where fees have been agreed to be paid either to a Senior or Junior Advocate but was not actually paid, they cannot normally be included in the bill of costs to be filed by the Advocate on record The rules cannot therefore apply to cases of disputes arising out of non-payment of fees to the Senior or Junior Advocates, not on record, by the clients Hence for services rendered by Advocates, other than Advocates on record, the Rules of the Supreme Court do not provide a machinery for realisation of their fees from their clients and they would therefore be entitled to recover such fees by a regular suit in a Court of competent jurisdiction

Petition under section 115 of Act V of 1908 praying the High Court to revise, the decree of the Court of the Small Causes, Madras, dated 26th March, 1964, and passed in N.T.A. No 441 of 1963 and N.T A. No 345 of 1963 (S C Suit No. 2817 of 1963 on the file of the Court of Small Cause, Madras).

S. V. Venugopalachari, for Petitioner.

O. K. Sri Devi, for Respondent.

The Court made the following

ORDER :—This is a petition to revise the order of the Bench of Court of Small Causes in N.T.A. No. 441 of 1963 and 445 of 1963 in S.C S. No. 2817 of

*C.R.P. No. 1547 of 1964. 27th October, 1966.

1963. The plaintiff in the suit is the petitioner before this Court. He filed the suit against the defendant for a sum of Rs 1,050 as fees due to him for the services rendered by him as Advocate on behalf of the defendant before the Supreme Court. The trial Judge came to the conclusion that there was no agreement to pay any specified sum as fees and that a sum of Rs. 500 would be a reasonable fees and holding that a sum of Rs. 300 had already been paid, passed a decree for Rs. 200 New Trial Applications were made by both the parties. The New Trial Application filed by the defendant was allowed and the suit dismissed on the ground that the Small Cause Court had no jurisdiction to entertain a suit of this nature. It is against that order that the present petition is filed.

The plaintiff is a junior Advocate of the Supreme Court He appeared before the Supreme Court on behalf of the defendant in a case before it. The case was ultimately disposed of ordering each party to bear its own costs Thereafter, the plaintiff filed the suit out of which the present petition arises. The question to be decided in this petition depends upon an interpretation of Order 40 of the Supreme Court Rules, 1950. According to the defendant's contention, which was accepted by the New Trial Bench, it is only the Taxing Officer of the Supreme Court that is competent to decide question regarding the fees as between a party and his Advocate, whether he is an Advocate on Record or any other Advocate. According to the plaintiff, the question of taxation by the Taxing Officer of the Supreme Court is only as between an Advocate on Record and a party and not between any other Advocate and a party. The defendant depends upon the definition of the words 'Advocate' and 'Advocate on Record' in the Rules and referring to rules 25, 26, 29 and 30 of Order 40 contends that the rules provide for taxation as between a client and an Advocate other than an Advocate on Record and that on such taxation, the order is executable by such Court as the Chamber Judge may direct. Now regarding the various rules in Order 40, it appears to me that rule 12 and the subsequent rules of Order 40, which relate to taxation, apply to cases where costs have been awarded between party and party. Therefore, we have then to come to rule 24 onwards Rule 24 clearly speaks of a dispute between an Advocate on Record and his client. So also does rule 27. But rules 25, 26, 29 and 30 refer merely to an Advocate, which will mean a Junior Advocate or a Senior Advocate. There is a clear distinction in the Rules between an Advocate and an Advocate on Record. It is on this fact that the defendant relies to contend that when rules 25, 26, 29 and 30 refer to an Advocate, they refer to an Advocate other than an Advocate on Record.

I shall deal with the further question whether an Advocate on Record or any other Advocate has no rights other than those provided by the Supreme Court Rules and he cannot resort to an ordinary civil Court for the purpose of realising the fees due to him from his client later. From the proviso to rule 28, it would be seen that the Advocate on Record might pay either to the Senior or the Junior Advocate fees in excess of those prescribed in the schedule and that is also a matter which the Taxing Officer may deal with in the case of a dispute between an Advocate on Record and his client. It appears to me that the provisions of these rules contemplate only the Advocate on Record dealing with the Supreme Court. He can only appear and plead and he cannot do so except along with an Advocate on Record. That itself would seem to imply that in the matter of taxation, a Junior or Senior Advocate cannot apply for taxation directly to the Court. It is contended by the defendant that in that case it is for the present plaintiff to apply for taxation through the Advocate on Record. The Advocate on Record in this case is unfortunately dead That apart it appears to me that the fees payable to the Junior Advocate or the Senior Advocate has to be included by the Advocate on Record in the bill of costs, which the Advocate on Record has to produce before the Taxing Officer That can only relate to the fees which have actually been paid to the Senior Advocate or the Junior Advocate That is why the Proviso to rule 28 speaks of the Advocate on Record paying to the Senior or other Advocate, fees in excess of that prescribed in the Schedule with the previous written consent of the client.

Where no fee has been paid either to the Senior or the Junior Advocate, the Advocate on Record cannot include any such item in the bill of costs to be filed by him. Where fees have been agreed to be paid to either a Senior Advocate, or a Junior Advocate, and they have not been so paid, it cannot naturally be included in the bill of costs to be filed by the Advocate on Record Now do rules 25, 26, 29 and 30 by implication provide for cases of dispute regarding non-payment of fees to Junior and Senior Advocates by clients ? I am afraid not It would require much more positive words than those found in those rules to lead to the implication that a Senior or a Junior Advocate, who has not been paid his fees, can approach the Taxing Officer for the determination of the fees payable to him and for the fees so determined to be realised in execution. Those rules also when they speak of an Advocate seem to refer only to an Advocate on Record That the word Advocate need not necessarily always refer only to an Advocate other than an Advocate on Record is clear from the fact that in rule 1, Order 1, of the definitions of the words "Advocate " and " Advocate on Record " are only " unless the context otherwise requires." I think the context requires the word Advocate in rules 25, 26, 29 and 30 of Order 40 to be read as referring to an Advocate on Record. The whole arrangement regarding the procedure in the Supreme Court where the Advocate on Record only deals with the Court and the Senior or Junior Advocate only acts through the Advocate on Record can lead only to this conclusion It follows, therefore, that at least as far as Advocates other than Advocates on Record are concerned the Supreme Court Rules do not provide a machinery for realisation of their fees from their clients and therefore the decision of the New Trial Bench holding that the Small Cause Court has no jurisdiction to entertain a suit of this kind is not correct

The Civil Revision Petition is allowed and the New Trial Bench will proceed to dispose of the other questions arising in the New Trial Applications. No costs.

R.M. *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO

Saifuddin Hussainibhoy Siamwala and others ... *Petitioners**

v.

The Burma Cycle Trading Co. . *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (*a*) (iii)—*Landlord, an unregistered partnership—If can maintain a petition for eviction of tenant—Partners if can file the proceedings in their individual names*

Partnership Act (IX of 1932), *section* 69 (3)—*'Other proceeding'—If includes a proceeding for eviction of tenant under the Rent Control Act*

Where a premises is owned by four individuals who are carrying on business in partnership and they require the premises in the occupation of a tenant for carrying on their own business, it is in fact a requirement of the partnership business which they are carrying on If such a partnership is not registered, it cannot maintain a petition for eviction of the tenant as section 69 (3) of the Indian Partnership Act imposes a total ban on the institution of any legal proceedings by an unregistered firm The fact that the building is owned by four individuals alone makes no difference so long as the evidence discloses that it is the unregistered partnership of the four individuals that own the premises in the eye of law and the premises is required by such firm for their business The fact that some of the co-owners of the building, though interested in the partnership, are not actually or actively associated in the carrying on of the business, cannot mean that the requirement is only by the particular individual or individuals among the partners, who are actually carrying on the partnership business So long as the requirement is that of an unregistered partnership a petition under section 10 (3) (*a*) (iii) of the Madras Building (Lease and Rent Control) Act for eviction of a tenant from the building owned by the partners of such a firm is not maintainable

The words ' other proceedings' in section 69 (3) of the Partnership Act are elastic enough to include a petition under the Madras Buildings (Lease and Rent Control) Act, 1960 Where the petitioners

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*C R P. No 243 of 1965. 22nd December, 1966.

are members of an unregistered partnership firm they cannot maintain a petition under section 10 (3) (*a*) (iii) of the Act for eviction of the tenant of a building belonging to them on the ground that they require the same for the partnership business carried on by them

Where the lower Court comes to an erroneous conclusion on an essential jurisdictional fact, the High Court can interfere in revision

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960, praying the High Court to revise the order of the Chief Judge, Court of Small Causes, Madras, dated 10th November, 1964 and made in H R.A No. 13 of 1964 (H.R.C. No. 3810 of 1962 on the file of the Rent Controller, Madras).

D. Ramaswamy Ayyangar and *S Kuppuswamy*, for Petitioners.

V. K. Thiruvenkatachari for *K C Jacob*, *S K. L. Ratan* and *M. X. Cardoza*, for Respondent.

The Court made the following

ORDER :—The landlords are the petitioners before me The petitioners filed an application under section 10 (3) and section 10 (2) (ii) (*a*) of the Madras Buildings (Lease and Rent Control) Act against the respondent and another on the ground that they required the premises *bona fide* for their own use, occupation and business, and that the respondent, without the consent of the petitioners, sub-let a portion of the premises to one Dhandapani & Company who was also impleaded in the lower Courts. Before me, however, the question whether the respondent has sub-let the premises has not been agitated and even the alleged sub-tenant has not been impleaded as a party to this petition. The respondent's contention was that the petition is misconceived and denied that the petitioners are partners of the firm of "Saleh Brothers" which pleading was evoked because of the allegation in paragraph 5 of the petition that "the petitioners are carrying on the business under the name and style of "Saleh Brothers at No. 6, Sembudoss Street." The respondent also contended that the premises in question is not suitable to the hardware business admittedly carried on by the petitioners in Sembudoss Street Incidentally the respondent also pleaded that the petitioners' requirement was not *bona fide* because they demanded a higher rent. One of the petitioners examined himself. He admitted in chief-examination that the rent for the suit premises goes into the account of Saleh Brothers of which the petitioners are partners and that all the petitioners shared the profits. He also said in cross-examination that it is a registered partnership, but added that only two names of the petitioners are found in the certificate of registration issued by the Registrar of Firms and the names of petitioners 3 and 4 are not to be found in the said certificate. Several exhibits were filed amongst which Exhibit. P-4 (a) is an extract from the Day Book of the firm of Saleh Brothers showing that petitioners 3 and 4 also participated in the profits No doubt, the sale deed pertaining to the suit property is in favour of all the four petitioners When the case came up for hearing on 6th December, 1963, before the Rent Controller, he allowed the petition It does not appear from the record that the objection which is now pressed into service vehemently by the learned Counsel for the respondent, namely, that Saleh Brothers of which the petitioners purport to be partners, is not a registered firm of partnership and therefore the proceeding instituted by them under the Madras Buildings (Lease and Rent Control) Act for eviction being "a legal proceeding", cannot be so instituted by an unregistered partnership, was not seriously raised

In the appellate Court, an application for stay of execution of the order of the Rent Controller was filed In the affidavit in support thereof, the respondent raised the contention that the petitioners have admitted that they are carrying on business in partnership, and the partnership not being registered, the petition is not sustainable under section 69 (3) of the Indian Partnership Act. To this a counter-affidavit was filed by one of the petitioners wherein also there is an admission that all the four petitioners are interested in the business as such partners In paragraph 5 of the counter-affidavit filed by one of the petitioners, Saifuddin Hoosainibhoy on 28th January, 1964 stated "As will be seen from the petition,

the application has been filed by all the *four partners* who are the landlords." The appellate authority, by its order dated 12th March, 1964 called for findings on the following points :

" 1 Are all the petitioners the partners in the firm of Saleh Brothers ?

2. Is a single petition against two different tenants maintainable ?

3 Is the premises occupied by the first respondent in the petition suitable for the business of the landlord ?

4. Do the landlords own other buildings in the City of Madras ?"

Fresh evidence was again let in on such remand by the appellate authority and there was an admission by one of the petitioners that petitioners 3 and 4 (sisters) are not shown as partners in the Register of Firms and that even in the partnership deed only the first and second petitioners are shown as partners. This aspect, namely, that the Register of Firms kept by the Registrar of Firms does disclose only the names of petitioners 1 and 2 as partners thereto is not in dispute. The Rent Controller who was called upon to give a finding on the points raised as above, found that petitioners 1 and 2 only are partners of the firm of Saleh Brothers and the other two are not We are not in this petition concerned with the finding given on points 2 and 3 referred to above

When the case again came up before the appellate authority, the learned Chief Judge of the Court of Small Causes accepted the findings of the Rent Controller, but held that the petition need not be dismissed on the ground that an unregistered partnership has filed the petition, as, according to him, the cause of action has arisen to the petitioners apart from a contract, and, in fact, by virtue of the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960 The learned Chief Judge of the Court of Small Causes, however, held that even though all the partners shared in the profits of the firm, that by itself was not sufficient, in his opinion, to confer on all the four petitioners herein the status of partners in that firm. He considered, however, the question of maintainability of the petition by all the four petitioners herein when the premises was actually required for the use of a firm in which two of the petitioners only are partners. While distinguishing the case reported in *Sha Riknabdas Amritlal* v. *Venkatasubbiah Chetty*[1], he held as follows :

" It is not as if that all the landlords want eviction for the purpose of a business in which all of them are partners with others. On the other hand, in the instant case, respondents 3 and 4 herein are not partners in Saleh Brothers and as far as they are concerned they required the building for the purpose of a business which they are not carrying on I, therefore, hold that section 10 (3) (*a*) (iii) will not apply. Consequently this petition is not maintainable "

He, however, held that with regard to the *bona fides*, there is sufficient evidence to show that the firm of Saleh Brothers is ordered to be evicted from No 6, Sembudoss Street, George Town, by its landlords and he agreed with the findings of the Rent Controller that the requirement is *bona fide* In the result, however, he dismissed the petition, as not being maintainable Against this order of the Court of Small Causes, this revision petition has been filed

Sri D Ramaswami Iyengar, appearing for the tenant, urged before me the following points The petitioners are carrying on the business for the common benefit of all and for the furtherance of mutual interest and this by itself cannot mean that they are partners in the business The signing of cheques, the administration of the firm are only in the hands of the first two petitioners The idea of partnership is foreign to the petition Saleh Brothers is merely a trading style and the enquiry whether petitioners 3 and 4 are partners of the firm of Saleh Brothers do not arise on the pleading and should not have been allowed to be raised The contract of tenancy in the case is between the petitioners on the one hand and the respondent on the other In considering the expression 'landlord' and 'own' appearing in the Madras Buildings (Lease and Rent Control) Act, petitioners 3 and 4 may be ignored and their rights need not be considered at all as two of the petitioners are admittedly landlords and they do own the premises in question.

1. (1964) 2 M L J 132.

The property does not belong to the partnership. In the alternative, it was argued that even if petitioners 3 and 4 are deemed by a fiction to be partners, they are in fact dependants on petitioners 1 and 2 and that therefore the petition is maintainable and the lower Court having found that the requirement is *bona fide*, the petition has to be ordered. Reference was made to sections 4, 5 and 6 of the Partnership Act as well

Mr. V K Thiruvenkatachari, appearing for the respondent stated that the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) is a self-contained Act and therefore its provisions are to be the sole guide in respect of proceedings taken under it He took me through the oral and documentary evidence in the case, the purport of which has already been referred to by me His main contentions were that the petition is not maintainable, since the proceeding initiated by the petitioners being a legal proceeding and the petitioners having constituted themselves to be the partners of a firm and that firm not having been registered under the Indian Partnership Act, such a legal proceeding is not maintainable under section 69 (3) of the Indian Partnership Act. He also contended in the alternative that the requirement of the premises by two of the petitioners who are actually on record as partners of the firm of Saleh Brothers, cannot be deemed to be a requirement for the occupation of all the four petitioners and thus supported, but in a different way, the finding of the lower Court that the petition is not maintainable under section 10 (3) (*a*) (*iii*) of the Madras Buildings (Lease and Rent Control) Act.

I shall now consider the respective contentions of the learned Counsel for the petitioners and the respondent There are candid admissions by one of the partners of the firm of Saleh Brothers that all the petitioners are partners in the firm. A partnership, though often called a contract, is a relation resulting from a contract. Regard should be had to the real intention between the parties. Section 6 of the Partnership Act prescribes the test to determine whether a group of persons are partners in the eye of law In fact, it enables all the relevant facts to be taken into consideration to find out whether the group of persons do or do not constitute a partnership firm. Lindley on Partneship, Twelfth Edition, at page 52 observes as follows :—

> " The main rule to be observed in determining the existence of a partnership, a rule which has been recognised ever since the case of *Cox* v. *Hickman*[1], is that regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case "

The above principle has been so expressed in section 6 of the Indian Partneship Act (IX of 1932) On a fair reading of the documentary evidence and on appreciation of the oral evidence and admissions of one of the petitioners, it cannot be disputed that all the four petitioners before me are partners of the firm of Saleh Brothers and it is that partneship which is asking, for itself, in this legal proceeding the possession of the premises in the occupation of the respondent for a business which is being carried on by them as above If, therefore, the four petitioners before me are partners in the eye of law, though two of them only are shown in the Register of Firms as partners, it has to be considered whether this petition can be maintained under the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) This leads on to the consideration whether a petition for eviction under the Madras Buildings (Lease and Rent) Control Act (XVIII of 1960) is a proceeding to enforce a right arising out of a contract within the meaning of section 69 (3) of the Indian Partnership Act. The Federal Court had occasion to consider the question whether action under section 46 of the Indian Income-tax Act (XI of 1922) is covered by the phrase " other legal proceeding " within the meaning of section 171 of the Indian Companies Act of 1913 In *Governor-General in Council v Shiromani Sugar Mills Ltd (in Liquidation)* [2] Spens, C.J., delivering the leading judgment of the Federal Court, observed as follows (at page 56) :

> " Clearly it is not a proceeding in an ordinary Court of law But we see no reason why in British India no " legal proceeding " can be taken otherwise than in an ordinary Court of law, or why a proceeding taken elsewhere than in ordinary Court of law, provided it be taken in a manner prescribed by law and in pursuance of law or legal enactment, cannot properly be described as a " legal proceeding "

1. (1860) 8 H C.I. 268.
2. (1946) 1 M L J 415 · (1946) F C.R. 40.

The Supreme Court in *J Chandra Gupta* v. *Kajaria Traders (India) Ltd* [1], had to consider the import of the expression "other proceeding" in section 69 (3) of the Partnership Act, and observed as follows

"In our judgment, the words "other proceeding" in sub-section (3) must receive their full meaning untrammelled by the words "a claim of set-off" The latter words neither intend nor can be construed to cut down the generality of the words "other proceeding" The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4)"

Incidentally the question arises whether "other proceeding" referred to in section 69 (3) in the instant case is one to enforce a right arising from a contract There cannot be any dispute that the right that is sought to be enforced by the petitioners in this case does arise under a contract between themselves as landlords and the respondent as the tenant No doubt, the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) intervenes and provides for certain special procedure for the enforcement of such rights But that would not militate against my holding that the proceeding in question is one to enforce a right arising from a contract

Thus, it is the accepted principle in law that no proceeding can be instituted by an unregistered partnership against any person There is therefore a totality of ban on the institution of such proceedings The words "other proceedings" in section 69 (3) is elastic enough so as to include within its fold a petition under the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) by the partners of such an unregistered firm for the possession of the premises from the tenant for their own occupation I have already held that the petitioners before me cannot dispute that they are not partners carrying on the business of Saleh Brothers. It is so stated in paragraph 5 of the petition itself. The petitioners being members of an unregistered partnership firm, cannot therefore maintain this petition. I do not agree with the reasoning of the learned Chief Judge, Court of Small Causes that the proceeding in the instant case is not one in which the cause of action is based on any contract. I, therefore, hold that there is absence of jurisdiction on the part of the tribunals constituted under Act XVIII of 1960 to entertain the petition itself. As, on this essential jurisdictional fact, the lower Court has come to an erroneous conclusion, the finding that the petition is maintainable in the above circumstances has to be set aside even though I am exercising revisional jurisdiction.

The above conclusion of mine is sufficient to dismiss this revision petition. But one other contention raised by the respondent in the lower Court and which found favour with the learned Chief Judge, Court of Small Causes, was that as two and not all the four of the landlords are carrying on business of their own, it cannot be said that the requirement of the premises as if all the four landlords do require the premises for a business of their own is tenable Mr. Ramaswami Iyengar appearing for the petitioners before me, stated that as two of the petitioners are admittedly landlords and their requirement of the premises in question is found to be *bona fide* it would not matter whether two other petitioners who are also impleaded in the petition, since they are co-owners of the property are not actually carrying on business and they do not require the premises for a business of their own I am unable to agree with this extreme contention put forward by Mr. Ramaswami Iyengar. In *Tunstal* v. *Steigmann* [2], their Lordship held that a limited company and the individual or individuals forming the company were separate legal entities, however complete the control might be by one or more of the individuals over the company. Danckwerts, L J. in the above case observes as follows :—

"... the personality of those in control of the company was only to be regarded as material in special circumstances, such as a state of war, and only as indicating the nature of the company without really departing from the principle that a limited company incorporated under the Companies Act is a distinct legal entity, differing from the individuals who hold the shares in the company or control it through the mechanism of the Companies Acts As Ormered, L J, pointed out, if persons choose to conduct their operations through the medium of a limited company with the advantages in respect of responsibility for debts thereby conferred, they cannot really complain if they have to face some disadvantages also"

1 (1965) 1 S C J 249 2 L R (1962) 2 Q B 593.

It is unnecessary to multiply authorities on this question. The facts of the case in *Shankhasdas Amritlal* v *Venkata Subbiah Chetty*[1] are entirely different from the facts in the instant case Though no doubt two of the partners only are in charge of the partnership firm and the other two are only beneficially interested therein, I am unable to agree with the contention of Sri Ramaswami Iyengar that the idea of partnership is foreign to the petition filed in this case. No doubt the petitioners are the co-owners of the premises. But this allegation as is disclosed by the sale deed cannot be considered independently and *de hors* the other evidence in the case and indeed the admissions of one of the petitioners in the witness box as well as in the affidavits sworn to by him It appears to me that the requirement of the premises is by the unregistered partnership firm consisting of the four petitioners herein. The argument that the other two sisters, that is, petitioners 3 and 4, should be deemed to be dependent on petitioners 1 and 2 and therefore their requirement should be considered as *bona fide*, taken along with the established *bona fide* requirement of petitioners 1 and 2, is a contention which is devoid of merit The expression used in the relevant section of Act XVIII of 1960 is ' landlord '. On a sifting of the evidence in this case I have come to the conclusion that the landlords of the premises in question though *prima facie* are the four petitioners before me, but in reality and in the eye of law it is an unregistered partnership which owns the premises. Therefore, it is the requirement of an unregistered partnership that has to be considered in this case It cannot equally be disputed that the sisters, that is, petitioners 3 and 4, are not carrying on any business of their own In such circumstances the finding of the Chief Judge, Court of Small Causes, that as far as petitioners 3 and 4 are concerned, their requirement of the building in question is for purposes of a business which they are not carrying on is well founded Therefore, under section 10 (3) (*a*) (iii) of Act XVIII of 1960, it cannot be said that all the petitioners are entitled to the possession of the building within the meaning of the above section. In this view, I agree with the finding of the learned Chief Judge, Court of Small Causes, that the petition is not maintainable on this ground

No other contention was raised before me by the learned Counsel for the petitioners As the petition is not maintainable on both the grounds dealt with by me as above, this revision petition is dismissed, but in the peculiar circumstances of this case, there will be no order as to costs.

R.M. — *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE A. ALAGIRISWAMI.

Jhun Jhunwala Brothers . *Petitioners**

v.

N.K M. Subbaramier *Respondent.*

Contract Act (IX of 1872), section 23—Forum for filing suit—Contract restricting jurisdiction to one of several Courts—Validity—Scope of

Practice—Parties agreeing that disputes between them will be subject to Courts within a particular territorial jurisdiction—Scope of

It is now an established position in law that where there are more than one Court which will have jurisdiction to try a particular cause it is open to the parties to agree that only one of those Courts will have jurisdiction to try the same Where the terms of the contract specifically say that it is 'subject to jurisdiction of Cuttack Courts only' it is clear that other Courts will have no jurisdiction to entertain the suit even though part of the cause of action has arisen within their jurisdiction.

The word ' only' in the contract is enough to show the ouster of jurisdiction of other Courts.

M/s Patel Bros v *M/s Vadilal*, (1959) 1 M L J 106, distinguished and explained.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Second Additional Subordinate Judge, Madurai, dated 25th February, 1964, and passed in S.C.S. No. 583 of 1962.

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1 (1964) 2 M L J. 132.

*C R P No 1721 of 1964 29th November, 1966.

V. Thiagarajan and *V. R. Nagarajan,* for Petitioners.

K. Sanjeevi Naidu, K. Kumaraswamy and *P. Kannan,* for Respondent.

The Court made the following

ORDER.—This is a petition under section 25 of the Provincial Small Cause Courts Act by the defendant in S.C. No. 583 of 1962 on the file of the Subordinate Judge's Court, Madurai to revise the judgment and decree, decreeing the plaintiff's suit.

The plaintiff sued for recovery of a sum of Rs. 10,77-45 nP. being the excise duty collected by the defendant from him which he alleged he was not entitled to do. The defendant has got his factory near Cuttack and he supplied some soda bottles to the plaintiff at Madurai. In his bill he had claimed excise duty which was newly levied on the goods which according to him were produced after 1st March, 1961. The defendant took objection to the jurisdiction of the Madurai Court to try the suit. He also raised other objections with which we need not concern ourselves in the view that I take on the question of jurisdiction.

Exhibit B-4 is the relevant document which reads as follows :

"Dear Sirs,

Please supply the under-noted goods as per your terms of contract, printed on the back and despatch the same on our account and risk to Madurai"

The terms of the contract printed on the back of Exhibit B-4 in so far as they are relevant read as follows :

"This order is subject to confirmation by the works at Barang, S E Ry and shall be considered as having been made at Barang and subject to the jurisdiction of Cuttack Courts only"

The learned Subordinate Judge in dealing with the question of jurisdiction remarked that part of the cause of action arose in Madurai and therefore the Madurai Court has also got jurisdiction. He did not specifically consider the point that only the Cuttack Courts had got jurisdiction and not the Madurai Court under the terms of the contract The established position in law is where there are two Courts which will have jurisdiction it is open to the parties to agree that only one of those Courts will have jurisdiction to try the suit. The question in this case therefore reduces itself to this :

"Whether the contract as evidenced by Exhibit B-4 in this case ousts the jurisdiction of the Madurai Court ?"

It will be necessary to refer to certain decisions in this connection

In *Mehta & Co* v. *Vijayam & Co.*[1], the term of the contract was 'in all legal disputes arising out of this contract Ahmedabad will be understood as the place where the cause of action arose'. It was held that this agreement is valid and must be given effect to and it is not open to the Madras Court of Small Causes to entertain the suit.

In *Raghavayya* v. *Vasudevayya Chetty*[2], the term in the contract required that the suit should be filed in Nandyal. But the suit was actually filed in Bezwada and the Court held that the suit could not be filed in Bezwada.

In *Hoosem Kasam Dada* v. *Padampat Sugar Mills*[3], the relevant clause in the contract read as follows

"All disputes in respect of this contract shall be settled by arbitration failing which shall be settled in Court of seller's jurisdiction where this contract shall be deemed to have been entered into"

It was held that this was a valid contract and therefore the suit could be entertained only by the Court within which the seller had his place of business.

The only decision which takes a slightly different view is the one in *Messrs Patel Bros.* v. *Messrs Vadilal*[4]. There the words 'subject to Bombay jurisdiction' were found in the bill issued by the defendant. Ramachandra Iyer, J., as he then was, observed as follows :

1 (1925) 49 M L J 189 A I R. 1925 Mad. 1145.

2 (1943) 2 M L J 375 A I R. 1944 Mad. 47.

3 (1954) 1 M L J 434 I L R. (1954) Mad. 855

4 (1959) 1 M L J 106 A I R 1959 Mad. 227

"Exhibit P-1 says that the transaction is 'subject to Bombay jurisdiction'. But it does not exclude the jurisdiction of any other Court In my opinion ouster of jurisdiction of a Court to which a person is entitled to resort to under the Civil Procedure Code or any other statute cannot be a matter of assumption or presumption but one to be proved by express words contained in the contract or at least by necessary or inevitable implication It cannot be said that this test is satisfied in this case."

The learned Judge also relied upon the decision of Balakrishna Iyer, J. (*Ramachandra Sahib* v. *Sirdarmal Kasarimal & Co.*)[1] wherein the words 'subject to Berhampur jurisdiction in the letter head of the defendant was held not to oust the jurisdiction of the Madras Court. But it will be noticed that in the present case the ouster of jurisdiction is specifically made a term of the contract and the contract also says that the contract shall be subject to the jurisdiction of Cuttack Courts only. In fact both in the decision in *Mehta & Co.* v. *Vijayam & Co* [2], as well as in *Hoosem Kasam Dada* v. *Padampat Sugar Mills*[3], the word 'only' was not used Even so the Courts held that only the Courts mentioned in the relevant terms of the contract had jurisdiction and not any other Court. The considerations that weighed with the learned Judge who decided the case in *Messrs. Patel Bros.* v. *Messrs Vadilal*[4], do not apply here because there it was considered that the ouster of jurisdiction was not specifically a matter of contract. Here it is clearly a part of the contract I hold therefore that the Madurai Court had no jurisdiction to entertain this suit.

The result would be that the decree of the learned Subordinate Judge at Madurai would have to be set aside. The plaint will be returned for presentation to the proper Court. There will be no order as to costs. The plaint will have to be presented in the Cuttack Court within a fortnight of its return by the Sub-Court at Madurai to the plaintiff.

R M ——— *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE M NATESAN.

Alagumalai Thevar and others .. *Appellants**

v.

Raju *alias* Karuppa Thevar .. *Respondent.*

*Religious Endowment—*De facto *trustee—Who is—Institution with a body of lawful trustees—One of them alone in actual management—Others neglecting the institution—Status of such managing trustee—If a* de facto *trustee—If can sue on behalf of the institution without impleading other trustees*

Words and Phrases—" De facto *trustee* "

If the lawful trustees of a religious institution or some of them neglect the institution and the institution is being looked after by the remaining trustee or trustees or even by a stranger, such a person in juridical parlance is generally termed as a *de facto* trustee Factually he is functioning as trustee and that is all that the expression conveys There is no magic in the word *de facto* It expresses what is happening, that the management is in the hands of a person who is not lawfully entitled to so manage

Where there are a plurality of trustees, all the trustees together constitute a corporate entity and if for convenience's sake one of them alone is actually functioning as such, such a person even though called a managing trustee cannot represent the temple Hence a single trustee, out of a body of trustees managing the trust properties will be doing so only in his individual capacity and not in his official status as trustee In such a case where the requisites for *de facto* trusteeship, continuity of conduct as trustee and course of management of the affairs of the institution, are present, he may properly be considered only a *de facto* trustee

Thus where it is found that the corporate body as such is not functioning and one of the persons constituting the corporate body alone is in management, his management can only be as a *de facto* trustee Such a person *bona fide* and in good faith in management can sue on behalf of the institution for recovery of the property held adversely to the trust by strangers, without impleading the other recalcitrant trustees

Sankaranarayana v *Poovanathaswami temple*, (1949) 2 M L J 171 I L R (1950) Mad 191, followed

1 C R P No 1010 of 1953 855
2. (1925) 49 M L J, 189 A I R 1925 Mad 1145
3 (1954) 1 M L J. 434. I L R (1954) Mad. 227
4 (1959) 1 M L J 106, A I R 1959 Mad.

* S A. No. 1572 of 1962. 31st August, 1966.

However, Courts will not encourage suits by a *de facto* trustee when there are *de jure* trustees and will be astute that that this privilege shown to the *de facto* trustee is not abused to sponsor his own personal claims

Appeal against the Decree of the Sub-Court, Madurai, in A S No 154 of 1960 against decree of the District Munsif of Tirumangalam in O.S. No. 279 of 1959

T R Mani, for Appellants.

M. V. Ganapathi, for Respondent.

The Court delivered the following

JUDGMENT.—The defendants in a suit in ejectment instituted on behalf of a Hindu temple who have failed in the Courts below in their attempts to retain possession of the properties of the temple they have trespassed upon, are the appellants in this Second Appeal The only live issue agitated in the lower appellate Court and now in Second Appeal, is as to the frame of the suit. It is contended that the temple has four trustees and as the suit has been instituted by only one of them, it must be dismissed *in limine*.

The suit properties were endowed by one Mayandi Thevar under a registered settlement deed on 7th July, 1940, in favour of Sri Sundaramurthi Vinayagar Koil, Vikramangalam Village, Tirumangalam Taluk, built by him The settlor made himself the trustee of the endowment for life and nominated four persons as trustees to manage the affairs of the endowment. After him the trusteeship was to be hereditary in the families of the trustees devolving on the senior-most heirs. From the records, it is seen, that Mayandi Thevar died in or about 1942, and thereafter the temple and its affairs were in charge of Mayandi Thevar's widow and Raju *alias* Karuppa Thevar, one of the trustees who has instituted the suit out of which this Second Appeal arises. After the death of the settlor's widow in or about 1956, this Karuppa Thevar continued in sole charge of the institution. The cause of action for the suit is trespass by the defendants upon the suit properties in January, 1957. Several defences inclusive of denial of an effective dedication were raised at the trial. They were all found against and the trial Court, on the evidence concluded, that the aforesaid Karuppa Thevar has been managing the suit temple as the trustee and is in possession of its properties. The contention that Karuppa Thevar who was one only of the trustees cannot by himself institute the suit without at least having in the array of defendants the other trustees who were admittedly alive, was overruled with the finding that Karuppa Thevar was the *de facto* trustee and as such competent to maintain the suit on behalf of the temple. There was ample and substantial evidence of Karuppa Thevar's management of the suit temple and its affairs for this finding An attempt was made in defence that the Hindu Religious and Charitable Endowments Board had appointed the fourth defendant in the suit as a trustee. But this was not established and the finding is that the defendants are trespassers without any title to be in possession of the suit properties and were holding the same adversely to the interests of the temple On these findings, following the Full Bench decision of this Court in *Sankaranarayana* v *Poovanathaswami temple*[1], a decree in ejectment followed. This has been confirmed in appeal. The learned Subordinate Judge affirmed the finding of the Court of first instance that Karuppa Thevar was in the position of a *de facto* trustee.

The argument of the learned Counsel for the appellants in the Second Appeal is two-fold . (1) there could be no *de facto* trustee when there are lawful trustees alive and (2) a refinement of the above, one of the lawful trustees cannot himself be a *de facto* trustee. As in the Courts below, learned Counsel rested his arguments on the decision, *Vedakannu Nadar* v. *Ranganatha Mudaliar*[2] and *The Commissioner for Hindu Religious and Charitable Endowments Board, Madras* v *Sethurama Pillai*[3] Reference is also made to *Rajendranath Dutt* v *Shaik Mohamed Lal*[4] None of the above

1 (1949) 2 M L.J 171 (F B) I L R 1950 Mad. 191
2. (1938) 2 M L J. 663.
3. (1960) 1 M L J 157
4. I L R 8 Cal 42 : L R 8 I.A. 135

decisions have, in my view, any relevancy in the context of the present claim as this case falls directly under the Full Bench decision of this Court in *Sankaranarayana* v *Poovanathaswami temple*[1], which in fact has overruled *Vedakannu Nadar* v *Ranganatha Mudaliar*[2] The first thing to be noticed in the present case is that the plaintiff is the Vinayakar Koil itself and Raju *alias* Karuppa Thevar one of the persons nominated as a trustee by the founder is only the human agency representing the temple in the proceedings He has styled himself as the managing trustee of the temple The manner in which he has styled himself is of little consequence ; what has to be found is his real position in relation to the inference that he is the ministrant of the deity in charge of its secular affairs.

Learned Counsel for the appellants submits that where there are a plurality of trustees, all the trustees together constitute a corporate entity and if for convenience's sake among themselves under some arrangement one of them is actually functioning and in day-to-day management of the affairs, such a person even though called a managing trustee by himself cannot represent the temple No one can quarrel with that proposition which is firmly established ; see *The Commissoner for Hindu Religious and Charitable Endowments Board, Madras* v. *Sethurama Pillai*[3]. The schedule of management among trustees would only be an arrangement *inter se*, but outside the co-trustees would form a corporate entity The representation of the institution could be valid and effective only if all the trustees jointly act and an institution or the body of trustees can be bound only if all are impleaded in the proceedings In the case in *The Commissioner for Hindu Religious and Charitable Endowments Board, Madras* v. *Sethurama Pillai*[3], the institution and the Board were sought to be bound by an order under section 84 (1) of the Madras Hindu Religious and Charitable Endowments Act of 1927. Notice had not gone to all the trustees and one of the trustees, who alone had notice of the proceedings and had filed application under section 84 (2) had on some concession then given, withdrawn the application he had filed It is in this context it was observed by the Division Bench :

> "A decision in order to bind the institution should be in a dispute between the institution or its accredited representative and another One of several co-trustees could represent neither the institution nor his co-trustees but only himself "

It was held that in the absence of notice to the several trustees that were functioning it could not be held that there was a dispute either with the trustees or with the institution as such for a decision or dispute as contemplated under section 84 (1) of the Act. In *Rajendranath Dutt* v. *Shaik Mohamedlal*[4], as pointed out in Full Bench case the trustees who had instituted the suit were found acting from motives personal to themselves and they sought to recover the properties for their own use

The contention of the learned Counsel that when persons nominated as trustees by the settlor are alive there can be no *de facto* trustee on the scene ignores the limited function of the *de facto* trustee which Courts recognise, as a matter of policy for the protection of the properties of Hindu Religious and Charitable Endowments. These socalled trustees are only managers. Ordinarily even the lawful trustee has only the management vested in him ; the title to the property is in the deity or institution If the lawful trustees or some of them neglect the institution and the institution is being looked after by the remaining trustee or trustees or even by a stranger, such a person in juridical parlance is generally termed as a *de facto* trustee. Factually he is functioning as trustee and that is all that the expression conveys. There is no magic in the word *de facto* It expresses what is happening ; that the management is in the hands of a person who is not lawfully entitled to so manage. In the present case under the settlement deed Raju *alias* Karuppa Thevar through whom the suit has been instituted by the temple is not entitled in law to be solely in management of the institution. But actually he is in charge of the institution. In my view, the learned Subordinate Judge is correct when he observed

> " If one of the lawfully appointed trustees is in sole possession of the properties and the other trustees are not taking any part in the management of the temple affairs, then the management solely

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1. (1949) 2 M L J 171 I L R (1950) Mad. 191 (F B)
2. (1938) 2 M L J 663.
3. (1960) 1 M L J 157
4. I L R 8 Cal 42 L R 8 I.A 135

by the one trustee will not be attributable to the powers got under the trust deed, but only to the fact that he has taken on himself the duty of the management of the trust affairs."

Observations in *The Commissioner for Hindu Religious and Charitable Endowments Board, Madras* v. *Sethurama Pillai*[1], support the proposition. It is observed therein while holding that a dispute with one only of a body of trustees will not be a dispute with a trustee:

"It should follow that the dispute under section 84 (1) should also be only with the trustee and not any other person as that other person could not apply under section 84 (2). We have already pointed out that a trustee would mean all the trustees acting jointly in a case where there is more than one trustee."

A single trustee out of a body of trustees managing that trust properties will be doing so only in his individual capacity and not in his official status as trustee. Where the requisites for *de facto* trusteeship, continuity of conduct as trustee and a course of management of the affairs of the institution are present, he may properly be considered to be only a *de facto* trustee. Now it has been recognised that even a worshipper may file a suit to secure to the deity its property improperly alienated or trespassed upon. If that is so, why not one of the trustees who has assumed the sole management of the affairs of the deity, his co-trustees evincing no interest in the institution? Here in the present case the temple itself is the plaintiff. It is a juristic entity entitled to sue and be sued and the person managing its affairs figures as the human agency giving expression to its claims. The property being vested in the temple and the temple figuring as the plaintiff, the full legal title in the property is represented in the suit. No doubt when there is a body of managers for the institution and the action is by one only of them in law the duly constituted representative is absent from the action. But when law permits suits by a *de facto* manager, is the institution to be placed at a disadvantage because it has lawful managers though these lawful managers have neglected the institution and are willing to be mute spectators of trespass on its properties? If the circumstances warrant and the action is *bona fide*, I fail to see why action in the name of the temple cannot be taken by the *de facto* manager. Where it is found that the corporate body is not functioning as such and one of the persons constituting the corporate body is alone looking after the affairs of the institution, his acts of management and representation are not under any legal title, the right of management not being vested in him solely. In such circumstances it is properly posited that his sole management of the institution can only be as *de facto* manager. In *Sankaranarayana* v. *Poovanathaswami Temple*[2], Rajamannar, C.J., observes:

"So long as an action is for the benefit of the real owner, namely, the idol or the mutt, and the person bringing the action is the only person who is in management of the affairs of the idol or the mutt for the time being, there is no reason why such a person should not be allowed to maintain the action on behalf of the idol or the mutt."

It is observed by Wadsworth, J., in *Subramania* v. *Srinivasa Rao*[3]:

"It is the duty of the Court to protect trust property from misappropriation and diversion from the objects to which it was dedicated. When trust property is without a legal guardian, owing to any defect in the machinery for the appointment of a trustee or owing to the unwillingness of the legal trustee to act, it would be a monstrous thing if any honest person recognised as being in charge of the institution and actively controlling its affairs in the interest of the trust should not be entitled, in the absence of any one with the better title, to take those actions which are necessary to safeguard the objects of the trust."

In the present case, the legal trustee, the corporate body consisting of four trustees obviously is unwilling to act and the honesty of purpose of the present ministrant of the temple is evident on the findings. Viswanatha Sastri, J., in his judgment in the Full Bench remarks (at page 223):

"But having regard to the position and status of shebaits and managers of Hindu Religious and Charitable Endowments and their relation to the endowed property, the legal title in which vests, not in the managers but only in the deity or the idol, the rule requiring all co-shebaits or managers to join in an action on behalf of the deity or idol is not so inexorable or incapable of exception or relaxation as in the case of a co-trustee strictly so called."

1. (1960) 1 M.L.J. 157 at 162.
2. (1949) 2 M.L.J. 171: I.L.R. (1950) Mad. 191 at 199.
3. A.I.R. 1940 Mad. 617.

The learned Judge sets out the following statement of the law by Biswas, J. in *Iswar Sridhar Jieu* v. *Jahorlal*[1]:

"As is, however recognised in many of these cases and is in fact implied in the statement of the rule, it cannot be maintained as an absolute rule of law that all the co-shebaits must join in representing the deity. The rule is subject to exceptions, and circumstances may exist in which the deity may be validly represented by some only of the shebaits, and even by a person who is not a shebait Where a suit is a suit by the deity represented by some of its shebaits, the question whether or not the other shebait should be joined as parties is often, in the last analysis, a mere question of procedure and expediency , the test is whether or not having regard to all the circumstances of the case, the interests of the deity may be said to be sufficiently represented "

No doubt Courts will not encourage suits by *de facto* trustees when there are *de jure* trustees for the institution. Lawful trustees cannot be ousted from their position in violation and fraud of their rights and the seal of approval of the Court sought for such wrongful assumption of management in suits for vindicating the rights of the deities. Also as it is only in the interest of the deity which cannot act by itself and initiate Court proceedings on its own for safeguarding its properties, that the right of a *de facto* trustee to sue for recovery of possession of property for the deity is recognised Courts will be astute that this privilege shown to the *de facto* trustee is not abused to sponsor his own personal claims.

On the facts here the other trustees nominated by the founder have not chosen to take upon themselves the responsibility of managing the affairs of the institution and have allowed P W. 1 to represent the institution and function as sole trustee. Trespassers are on the property and are asserting their rights. Their blatant defence is that the suit should be thrown out *in limine* on the ground of non-joinder of other trustees. Absolutely nothing has been found in the Courts below against the management by P.W.1. He claims himself to be a managing trustee. Whatever it may mean elsewhere, in the context of this case and on the evidence, he is a *de facto* trustee *bona fide* and in good faith in management of the affairs of the institution. The right of such person to sue for recovery of property held adversely to the trust by strangers has been firmly established by the Full Bench decision in *Sankaranarayana* v. *Poovanathaswami Temple*[2]. Effective relief to the real plaintiff can be given in this case without the other trustees being on record.

In the result, the Second Appeal fails and is dismissed with costs. No leave.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE M. NATESAN.

Ramiah Moopanar and others .. *Appellants**

v.

Chelliah Nadar .. *Respondent.*

Transfer of Property Act (IV of 1882), section 82—Rateable contribution between alienees of mortgaged property—Court cannot go beyond section 82 on equitable grounds

The liability for rateable contribution of the alienees of properties mortgaged in the first instance and sold subsequently to different persons could be rested only under section 82 of the Transfer of Property Act Hence in the absence of a contract between the contributories themselves, it is not open to the Court, on any equitable grounds, to rateably distribute the obligation for the mortgage debt amongst the parties, without reference to section 82

Kunchithapatham Pillai v *Palamalai Pillai*, (1917) 32 M L J 347 (1917) 39 I C 405 approved by the Full Bench in *Damodarasami* v *Govindarajulu*, I L R (1943) Mad 531 (1943) 1 M L J 291, Followed.

Appeal against the Decree of the Subordinate Judge, Tirunelveli, in Appeal Suit No. 29 of 1962 preferred against the Decree of the Court of the District Munsif of Ambasamudram in Original Suit No. 271 of 1960.

T. R Ramachandran and *R Sivapunyam*, for Appellants.

T. Martin, for Respondent.

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1. 49 C W.N 37, 49
2. (1949) 2 M L J 171 : I.L R. (1950) Mad. 191 at 199. (F B)

* S.A. No. 1699 of 1962. 11th October, 1966.

The Court delivered the following

JUDGMENT —This Second Appeal has been preferred by the defendants and arises out of a suit for contribution between alienees from the mortgagor after the satisfaction of the mortgage decree obtained by the mortgagee in O S No 22 of 1958 on the file of the District Munsif, Ambasamudram Three items of properties belonged to one Rajamannar Ayyangar He mortgaged them to one Ramalakshmi Ammal for a sum of Rs 5,000 He himself made some payments towards the mortgage and on 16th September, 1953 under Exhibit A-1 he sold one-half of item 1 in favour of the first defendant in the suit, out of which this Second Appeal arises, for a consideration of Rs 1,000 He received Rs 100 in cash and the balance of Rs 900 was reserved with the vendee to be paid to the mortgagee in part payment. Similarly, on 23rd October, 1953, under Exhibit A-2, he sold the other half of the first item to defendants 2 and 3 jointly for a similar consideration and here also Rs 900 was reserved with the vendee to be paid to the mortgagee in part payment On 1st December, 1953 under Exhibit A-3, he sold the third item of property to the plaintiff for a consideration of Rs 3,500 As on that date taking into account the payments to be made by defendants 1 to 3 of the amounts reserved with them, a sum of Rs 1,270 was payable for full discharge of the mortgage the said amount of Rs 1,270 was reserved with the plaintiff for payment to the mortgagee The second item of the mortgaged property was retained by the mortgagor to be enjoyed by him free of encumbrance As the defendants herein did not join with the plaintiff in discharging the encumbrance, the mortgagee filed the suit O S No 22 of 1958, for the balance due to her When execution was taken out by the mortgagee-decree-holder, the plaintiff and defendants 1 to 3 jointly, on 24th November, 1958 paid a sum of Rs 500 towards the mortgage decree Again, on 24th September, 1959, a further sum of Rs 500 was paid by them When making these payments, the plaintiff and the defendants, as among themselves, shared the amounts paid in the following proportion For every sum of Rs 500, the plaintiff contributed Rs 200, the first defendant Rs 150 and defendants 2 and 3 jointly a sum of Rs 150 Later, defendants 1 to 3 entered into some arrangement with the mortgagee-decree-holder and paid her Rs 2,000 and got their properties exonerated For the balance due under the mortgage, namely, Rs 1,788-50, the mortgagee proceeded against the property purchased by the plaintiff Having paid the mortgagee that amount, the plaintiff has come forward with the suit for contribution. The basis of his case was that as amongst themselves, the first defendant had to pay the mortgagee Rs 900 and defendants 2 and 3 jointly Rs 900 and himself (plaintiff) had to pay Rs 1,270 in terms of the directions in their respective sale deeds Approximately, in the proportion of 3 3 . 4 that proportion would govern the liability for contribution. On this basis, the plaintiff contended that giving credit for the payments made by the defendants, the first defendant would have to pay him a sum of Rs 136-55 and defendants 2 and 3 on their part a sum of Rs 136-55 But the trial Court held that the claim could be rested only under section 82 of the Transfer of Property Act, that there was no contract to the contrary as contemplated in that section and there was no privity of contract between the various purchasers from the mortgagor. It found that if under the principle of section 82 of the Transfer of Property Act the market value of each item of property was taken into consideration, the defendants cannot be made liable to pay any amount to the plaintiff as on that basis they had already paid off the amount they would be liable to the mortgagee In this view, the suit was dismissed On appeal, the learned Subordinate Judge, in the view that section 82 of the Transfer of Property Act was not applicable and that justice and equity demanded that the defendants must contribute in proportion to the liability undertaken by them as purchasers from the mortgagor, decreed the suit for contribution.

In this appeal by the defendants the principal contention is that there is no legal basis for the decree given by the lower appellate Court It is pointed out that there is no contract between the plaintiff and the defendants *inter se* obliging them to meet the liability to the mortgagee in any particular proportion. It must be

noticed that the undertaking by each vendee was with the mortgagor severally. These individual undertakings cannot bind the mortgagee or the other purchasers. The trial Court finds that there is no privity of contract between the parties and it may be said that the lower appellate Court does not find any contract between the plaintiff and the defendants No doubt, in the plaint it is vaguely stated that the parties had agreed to bear the liability for the mortgage in proportion to the amounts they had undertaken with the mortgagor to pay to the mortgagee But there is nothing on record to infer the existence of any such contract No issue even was raised on that The only question, therefore, for consideration is, whether, in the absence of a contract between the contributories themselves, it is open to the Court, on some equitable principle, to rateably distribute the obligation for the mortgage debt amongst the parties, without reference to section 82 of the Transfer of Property Act What induced the lower appellate Court in this case to take this view is the fact that the defendants had been placed in possession of the properties purchased by them and had been in enjoyment of the same, while they had parted only with one-tenth of the consideration amount in cash to the mortgagor The rest they had retained with themselves for discharge of the mortgage If all the purchasers had joined together and paid off the mortgages on the day the plaintiff purchased his item of property, the mortgage would have been then and there discharged It is the default on the part of defendants in not joining with the plaintiff in discharging the mortgage, that led up to the mortgage suit interest meanwhile swelling up In view of this, the learned Subordinate Judge thought that, on equitable considerations, the defendants could be called upon to rateably contribute to the plaintiff, even though the plaintiff may not secure any amount from them if section 82 of the Transfer of Property Act was applied Before the learned Subordinate Judge the decision of this Court in *Kunchithapatham Pillai* v *Palamalai Pillai*[1], was cited But while the learned Subordinate Judge's attention was drawn to an observation in *Bava Sahib* v *Krishna Boyan*[2], that it is no longer good law, regrettably a latter Full Bench decision of this Court approving it does not appear to have been cited It may be stated that the facts of the case in *Kunchithapatham Pillai* v *Palamalai Pillai*[1], though not identical, are so similar to the present case that the principles derivable therefrom would directly apply It is stated therein :

> "The liability to rateable contribution of properties mortgaged in the first instance and sold subsequently in lots to different persons is imposed by the Transfer of Property Act The legislation may have been based on equitable grounds , but its limits are prescribed by the statute "

In that case a mortgagor sold a portion of the mortgaged property to 'A' and directed him to pay a part of the debt Another portion of the property was sold to 'B' with a direction that he should also pay a part of the debt The rest of the property was sold to 'C' with a similar direction The last of the purchasers 'C' had to pay a much larger amount to the mortgagee The purchasers failed to pay as agreed upon It resulted in the mortgagee bringing a suit and obtaining a decree. 'A' and 'B' paid such portions of the debt as would, but for their undertakings, have been proportionately chargeable on the properties purchased by them, but less than what they had undertaken to pay C to avert the sale of his properties, had to pay the mortgagee considerably more than what he had agreed with the mortgagor to pay Having paid the amount, he sued the other two persons for contribution and, it was in these circumstances, it was held that the claim was not sustainable under section 82 of the Transfer of Property Act It was pointed out in that decision that by the mere fact of subsequent purchase, the purchser does not get an implied transfer of the undertaking given to the vendor by the earlier purchasers This decision finds affirmance in the Full Bench decision of this Court in *Damodarasami* v *Govindarajulu*[3] The learned Judges observed therein that the correctness of the decision is not open to doubt from any point of view. They observed at p 550

1 (1917) 32 M L J 347
2 A I R 1936 Mad 898
3 I L R (1943) Mad 531 (1943) 1 M L J 291.

"The defendants had already paid what they were liable to pay under section 82 and there was no contract between the respective purchasers making them liable to pay more."

At page 554 it is observed :

"Obviously, there can be no objection to the mortgagors agreeing what their rights and liabilities with regard to contribution *inter se* shall be, but as such a contract will not run with the land, it cannot affect a third party, unless he agrees to be bound by it"

It is pointed out that where the contract is between a mortgagee and his mortgagors, the position will be different, because such a contract will run with the land As I feel bound by the decision in *Kunchithapatham Pillai* v *Palamalai Pillai*[1], as directly applicable to this case, I do not think that any further discussion is called for. I may, however, point out that that part of the decision in *Kunchithapatham Pillai* v. *Palamalai Pillai*[1], which relates to the consideration of the scope of the expression 'bound by law to pay' in section 69 of the Contract Act has been subsequently dissented from in *Thirumalasubhu* v *Smt Rajammal*[2]. The observations in that regard run counter to the decision of the Privy Council in *Govindram* v *Gondal State*[3]. But so far as the decision goes in relation to section 82 of the Transfer of Property Act and its applicability to contribution between owners of properties subject to a mortgage, the observations of the Full Bench in *Damodarasami* v. *Govindarajulu*[4], are there and are binding upon me

Learned Counsel for the respondent drew my attention to the decision of this Court in *Meyyappa Chettiar* v *Murugappa & Sons*[5], but I do not find anything in that decision which in any way detracts from the principles laid down in *Kunchithapatham Pillai* v *Palamalai Pillai*[1], with reference to section 82 of the Transfer of Property Act. In fact that was not a case of contribution between persons holding properties which had been covered by the same mortgage, and it was a case where section 82 of the Transfer of Property Act was held not applicable. In this connection I may refer to *Kader Lal Seal* v *Hari Lal Seal*[6], where it is observed :

"In my opinion, the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer of Property Act read with the Civil Procedure Code I am clear we cannot travel beyond these statutory provisions

Here in the instant case under section 82 of the Transfer of Property Act, the plaintiff is not entitled to any remedy The defendants have paid more than their proportionate share of the liability. It follows that the decision of the lower Appellate Court cannot be sustained The suit for contribution therefore fails and is dismissed. The Second Appeal is allowed and the decree of the trial Court dismissing the suit is restored. The parties will bear their respective costs in this Court and in the lower appellate Court.

V. K. *Appeal allowed.*

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1. (1917) 32 M L J 347
2. I L R (1961) Mad 150 (1960) 2 M L J 539 A I R 1961 Mad 170
3. (1950) 2 M L J 1 L R 77 I A 156 A I R 1950 P C 99
4. (1943) 1 M L J 291, I.L.R (1943) Mad. 531 (F B)
5. (1959) 2 M L J 555 I L R (1960) Mad 24
6. (1952) S.C J 37 at 42 (1952) 1 M L J 431

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

PRESENT :—MR JUSTICE KUNHAMED KUTTI.

In the matter of the Arbitration Act X of 1940

S P. Sriram (Retired District Judge) 'Gandhi Peak' 274, Pycrofts Road, Madras-14 (Arbitrator) .. *Petitioner* *

v

The Pudukkottai State Electrical Undertaking represented by its Accredited Representative the South Madras Electric Supply Corporation Ltd., Tiruchirappalli and another .. *Respondents*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *Schedule II, Articles* 11 (*l*) *and* 11 (n)—*High Court-fees Rules* (1956), *Appendix II, item* 9—*Original Side Rules* (1956), *Order* 43, *rule* 16—*Application by arbitrator for filing award under section* 14 (2) *of Arbitration Act—Proper Court-fee—Governed by Article* 11 (1), *not by Article* 11 (n) *or item* 9 *of High Court-fees Rules*

Arbitration Act (X of 1940), *section* 14(2)—*Application for filing award by arbitrator under—Proper Court-fee*

An application by the arbitrator for filing an award under section 14 (2) of the Arbitration Act (X of 1940) would be governed, for purposes of Court-fee, by Article 11 (*l*) and not by Article 11 (*n*) of the Madras Court-fees and Suits Valuation Act (XIV of 1955) or by item 9 of Appendix II of the High Court Fees Rules (1956)

Item 9 of the High Cuort-fees Rules cannot apply when under rule 16 of Order 43 of the Original Side Rules (1956), the Court-fee payable in respect of proceedings under Arbitration Act are those set out in the Madras Act (XIV of 1955) There is no doubt incongruity between rule 16 of Order 43 of Original Side Rules and item 9 of High Court Fees Rules, but this is a matter for amendment of the latter rule and cannot supersede the former

S. T. Ramalingam and *K. Gopalaswami*, for Applicant.

The Government Pleader, for Respondents.

The Court made the following

ORDER —The question raised relates to the correct Court-fee payable on a petition under section 14 (2) of the Arbitration Act when the award is sought to be filed by the arbitrator.

In a dispute between the Pudukkottai State Electricity Undertaking represented by its Accredited Representative, the South Madras Electricity Supply Corporation Ltd , Tiruchirappalli, and the Madras State Electricity Board wherein Sri S.P. Sriram had been appointed arbitrator, the arbitrator sought to file his award with a petition under section 14 (2) of the Arbitration Act He affixed on the petition a Court-fee stamp of Rs 5 and when the office returned the petition pointing out *inter alia* that a Court-fee stamp of Rs 20 has to be affixed, the Advocate of the petitioner re-presented the petition stating that as per item 9 of Appendix II of the High Court Fees Rules, no additional Court-fee is payable. The matter was then placed before the Master who directed it to be placed before this Court as the question is likely to come up frequently and an authoritative decision is required on the point.

According to the office objection, when an award is filed without direction of the Court under section 14 (2) of the Arbitration Act, the residuary Article 11 (*l*) of Schedule II of the Madras Court-Fees and Suits Valuation Act (XIV of 1955) and not Article 11 (*n*) of the said Act applies and this view is supported by the ruling in *Ramaswamy Naidu* v *Salammal*[1]. The learned Government Pleader, who was given notice of this reference, is also of opinion that the aforesaid residuary Article applies to the facts of the present case. He has pointed out that item 9 of the High Court Fees Rules, 1956 which prescribes a fee of Rs. 5 (Rupees five) "on filing a certificate or report of a Commissioner or award of an arbitrator " cannot apply when under rule 16 of Order 43 of the Original Side Rules, 1956 the Court-fees payable in respect of proceedings under the Arbitration Act are those set out in the Court-fees and Suits Valuation Act of 1955. Under this Act, the relative Articles with which we are concerned are as already indicated, Articles 11 (*n*) and 11 (*l*).

* Diary No 5191 of 1966 20th December, 1966.

1. (1959) 2 M L J 417.

The former Article relates to applications under sections 14 and 20 of the Arbitration Act for direction for filing an award etc. This article does not apply, as the application now is by the arbitrator to file or to receive the award and issue notice to the respondents Article 11 (*l*) applies to Original petitions not otherwise provided for When such a petition is filed in the High Court, the Court-fee provided is Rs 20 (Rupees twenty) and there is no other Article for a petition by the arbitrator to receive the award and issue notice. If, therefore, Article 11 (*n*) does not apply, the only other Article applicable is Article 11 (*l*) This view gains support from the ruling in *Ramaswami Naidu* v *Salammal*[1], referred to above That was a case from Salem There the arbitrator had filed the petition in the Sub-Court under section 14 (2) of the Act for filing the award and Court-fee had been paid under Article 11 (*l*) of the Court-fees Act The Subordinate Judge held that the Court-fee payable was under Article 11 (*n*) and not under Article 11 (*l*) When the matter came up in revision to this Court, Ramachandra Ayyar, J , as he then was, held that Article 11 (*l*) applied to an application by the arbitrator for filing an award He pointed out that there is a well-marked distinction between a case where the arbitrator himself applies to have the award filed and a case where he omits to do so and the party prays to the Court for giving direction to an arbitrator to file the award The word " directed " in section 14 (2), according to the learned Judge, does not apply to a case where the arbitrator himself applies to the Court as no direction of the Court would be necessary to file the award which he can do at any time.

What is contended for the petitioner is that, since item 9 of the High Court-fees Rules remains unamended after the incorporation of Order 43 in 1956, he is entitled in this case to invoke the High Court Fees Rules and pay the lesser Court-fee The Arbitration Act was enacted in 1940 In 1941, the Original Side Rules of 1927 were amended by substituting in Order 38 the proceedings under Arbitration Act (X of 1940) in the place of proceedings under Indian Arbitration Act, 1899. Rule 16 therein provided :

" Fees in respect of proceedings under this Act shall be according to the table of fees in force for the time being on the Original Side of the Court as nearly as circumstances will permit "

In the Original Side Rules of 1956, old Order 38 was substituted by Order 43 and rule 16 therein prescribes that the Court-fees in respect of proceedings under the Act shall be those set out in the Court-fees and Suits Valuation Act (Madras Act XIV of 1955) and the Practitioners' fee shall be those set out in the Madras High Court Fees Rules It would thus appear that the fee now payable for a petition by the arbitrator is the fee prescribed under Court-fees and Suits Valuation Act of 1955 and that when no specific article is provided therein for an application by the arbitrator to file the award ; such an application obviously come under the residuary Article 11 (*l*). I am not, therefore, inclined to accept the petitioner's contention that he is still entitled to pay the lesser fee under item 9 of the High Court Fees Rules Any rule made by the High Court, as observed by the Supreme Court, in *R M Seshadri* v *The Province of Madras*[2], will not have the legal authority if the appropriate Legislature makes law on the same subject and such a law has been made by the Legislature by the Court fees and Suits Valuation Act of 1955

There is no doubt incongruity between rule 16 of Order 43 and item 9 of the High Court Fees Rules ; but this is a matter for amendment of the latter rule and cannot supersede the former The office tried to reconcile the conflict between rule 16 and item 9 of the High Court Fees Rules by suggesting that the petitioner has to pay Court-fee under both the provisions This suggestion is not tenable as two fees are not contemplated for a petition under section 14 (2). For the petitioner, my attention was however drawn to sub-section (2) of section 2 of Act XIV of 1955 The said sub-section is to the effect that where any law contains provisions

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1 (1959) 2 M L J 417

2. (1954) 1 M L J 206 . A I R 1954 Mad.

relating to the levy of fee in respect of proceedings under such other law, the 'provisions of this Act relating to levy of fee in respect of such proceedings shall apply subject to such provisions of such other law When this sub-section is read along with Order 43, rule 16, it would be found that the fee leviable is really under the Court-fees and Suits Valuation Act I am, therefore, of opinion that the petition has to be stamped with an additional Court-fee stamp of Rs 15 (Rupees fifteen) The petitioner will affix the correct stamp within two weeks from this date.

V K ——— *Order accordingly*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT —MR. JUSTICE P KUNHAMED KUTTI

Rani Ammal .. *Applicant**

v

Rathnasabapathi Mudaliar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 33, *rule* 1, Explanation—*Whether plaintiff is a pauper—Test to determine—" Means " and " sufficient means "—Meaning*

Under the *Explanation* to Order 33, rule 1 of Civil Procedure Code, a person would be a pauper if he is not possessed of sufficient means to enable him to pay the fee prescribed The question whether a plaintiff is a pauper or not turns upon the circumstances of each case The test is not whether he has the power of raising money in the abstract, but whether in the concrete circumstances of the case he can succeed in raising anything substantial by exercising it

" Means " certainly cover all realisable assets within a person's reach, but it is doubtful whether a right to enjoy a particular property for life, by which the person entitled to enjoy the same has to eke out his livelihood from the income of such property, can be considered " means " even if an offer is made to advance funds on such right It cannot be equated with the equity of redemption available to a mortgagor which certainly is an asset The right to enjoy a property is not normally a saleable or encumberable interest

" Sufficient means " is the capacity to raise the money necessary for payment of Court-fee But such capacity has to be considered consistent with the right which the person possesses

Application praying that (1) the order of the learned Master dated 26th September, 1966 in Application No 1274/66 (Pauper O S No. D ary No 6529/66) be set aside for the grounds stated therein and the plaintiff be allowed to sue as a pauper ; (2) and costs of this application be directed to be paid by the respondent.

T S. Purushotham, for Applicant.

V Thyagarajan and *U. Somasundaram,* for Respondent.

The Court made the following

ORDER —The question for consideration in this application by way of appeal from the Master's order is whether the applicant could be deemed to be a pauper within the meaning of Order 33, rule 1, Civil Procedure Code The *Explanation* to the above rule defines a ' pauper ' as a person who is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in the suit proposed to be instituted, or, where no fee is prescribed when such person is not entitled to property worth Rs 100 other than his necessary wearing apparel and the subject-matter of the suit.

The suit proposed to be instituted in this case is for partition and possession of the plaint A, B and C Schedule properties and for past mesne profits of a sum of Rs 60,000 and future mesne profits at the rate of Rs 2,500 Plaint 'A' Schedule immovable properties are of the value of Rs 7,15,760 and B schedule immovable-properties are of the value of Rs. 2,60,960-80 The C schedule comprises movable properties of the value of Rs 10,500 In all these items, the appellant claims a half share One of the objections raised by the respondents-defendants is that the plaint claim, particularly in respect of mesne profits has been highly exaggerated

* Application No 2431 of 1966. 10th January, 1967.

and the original figure of Rs 20 000 has been increased to Rs 60,000 without any justifiable reason to get the suit filed as a pauper That apart, the question for consideration is whether the applicant can be deemed to be a pauper, as, at this stage, we have to take the claim made by the applicant as it is and consider whether she is a person without means to pay the requisite Court-fee

The applicant is the daughter of one Palani Mudaliar, son of one Thanikachala Mudaliar who was possessed of very considerable properties Thanikachala Mudaliar had executed as many as seven settlement deeds including one in favour of the applicant. Under this settlement, the applicant is given a life interest in respect of a house, portion of which now yields to her a rent of Rs 100 according to her but more according to the respondents. It is nevertheless conceded by the respondents that otherwise the applicant is not possessed of any other properties or means While she was in the box before the Master to make out her pauperism, she was put the question in cross-examination whether she was willing to hypothecate the house in favour of the defendants for the amount of the Court-fee payable by her which comes to Rs 4,800-50. The applicant was not prepared to give a forthright answer. She explained that even bankers would not come forward to take a mortgage of the life interest, that if she borrowed, it would not be possible to repay the loan from the income which she gets and that if a mortgage is effected and rents are taken away for realisation of the mortgage amount, it would not be possible for her to maintain herself I should mention here there is already a mortgage on the life interest of the appellant in respect of which a sum of Rs. 900 is still payable.

Before me, Sri Thyagarajan for the respondents offered to advance the required funds for payment of Court-fee at 6 per cent. interest, which according to him, would entail a total interest per year of Rs 300 He urged that if the applicant has any *bona fide* or real claim, she should not mind raising a further mortgage on her life interest which his clients are prepared to take I am not very sure whether, the scope of raising funds, could include or imply an offer of the nature made by the respondents to advance funds to the detriment of her maintenance and whether such an offer could be considered as 'means available' to the person who, in the absence of the offer, has to be deemed a pauper 'Means' certainly cover all realisable assets within a person's reach , but it is doubtful whether a right to enjoy a particular property for life by which the person entitled to enjoy the same has to eke out his livelihood from the income of such property can be considered means even if an offer is made to advance funds on such right. To my mind, it cannot be equated with the equity of redemption available to a mortgagor which certainly is an asset The right to enjoy the property is not normally a saleable or encumberable interest though, as in this case, persons interested might offer to purchase or take a mortgage, not necessarily to help the vendor or mortgagor, but to place the allottee, in embarrassing circumstances.

In *Ponnuswami Pillai* v. *Venkatarama Chetty*[1], 'sufficient means' was explained by me to mean the capacity to raise the money necessary for payment of Court-fee. But such capacity has to be considered consistent with the right which the person possesses. Where a saleable interest is available to the applicant as the son of his father, Krishnaswami Naidu, J., held in *Venkatasubba Reddy* v. *Kesava Reddy*[2], that he cannot be held to be a pauper without some evidence that he was not able to raise money on the security of such property. But it is a question whether she can raise money in the normal course and not under restraint.

As to whether a plaintiff is a pauper or not, as pointed out by Ramesam, J , in *Ramanuja v. Gopalan*[3], turns upon the circumstances of each case and it cannot be laid down as an abstract proposition that in every case where the plaintiff has got a mortgage or a similar claim he cannot be regarded as a pauper. The test is not

1. (1961) 2 M.L.J 243.
2. (1950) 1 M.L.J. 463.
3. A I.R. 1934 Mad. 561.

whether he has the power of raising money in the abstract, but whether in the concrete circumstances of the case he can succeed in raising anything substantial by exercising it. In *Sundarathammal* v *Paramaswami Asari*[1], where two widows of the last male owner in possession of his properties with only a life interest thereon applied for leave to file a suit *in forma pauperis*, Walsh, J., held that having regard to the practical difficulty of raising money on their life interest, the widows could plead their poverty even if they sued as trustees of an estate which was not itself a pauper.

It seems to me that, having regard to the facts of this case, I should not take the offer of the respondents in this case to advance funds for payment of Court-fee on interest which, along with the other liabilities already on the property is likely to deprive the applicant of her maintenance, as quite, *bona fide* ; so that, despite this offer, I am inclined to consider that, as matters now stand the applicant has to be deemed a pauper being possessed of no funds sufficient to pay the Court-fee for the suit.

The result is that this applicat on has to be and is allowed and the plaint will be taken on file and numbered if it is otherwise in order as a pauper suit.

V.K. ——— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K VEERASWAMI AND MR. JUSTICE M. NATESAN

P. Subrahmanyam Chetty and others .. *Petitioners* *

v.

The Authorised Officer, Land Ceilings, Saidapet, Madras-15 and others .. *Respondents.*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 22—Jurisdiction under is quasi-judicial—Government cannot issue administrative instructions—Declaration of invalidity of transactions under section 22—Proper procedure

Constitution of India (1950), Article 226—Writ by public trust to restrain proceedings under Madras Act (LVIII of 1961) on ground that it is out of its purview—Maintainability

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961)—Transactions entered into after Act was struck down but before its revival with retrospective effect—Enforcement of provisions of the Act with regard to—Liberal view to be taken

The jurisdiction under section 22 of Madras Act LVIII of 1961 is quasi-judicial and the officers entrusted with that jurisdiction should be left free to decide matters arising under it without any external influence No administrative instructions in the matter can properly be issued by the Government either classifying transactions which will fall within the purview of section 22 or giving any other indication as to how matters should be disposed of under that section

The Authorised Officer can treat a transaction falling within the purview of section 22 as invalid only after observing the procedure laid down by that section and making an order thereunder He cannot proceed merely on assumptions

Where the contention is that an institution is a public trust and as such outside the purview of Madras Act LVIII of 1961, a writ petition to restrain the authorities to proceed under its provisions would be incompetent The proper remedy would be to file a suit for a declaration as to the character of the institution with consequential reliefs

Wherever by reason of Article 31-B of the Constitution of India and consequent retrospective validation of Madras Act LVIII of 1961 after it was struck down by the Supreme Court transactions which took place at the time when the Act was considered to be invalid are affected, a liberal view will have to be taken in respect of those transactions and the authorities should exercise restraint in rigidly enforcing the Act In other words, the provisions of the Act should not be enforced in relation to such transactions with a view to invoke penalty or forfeiture, the reason being that at the time the transactions were entered into they were entered into *bona fide* on the view rightly held that the Act was not in force

Petition under Article 226 of the Constitution of India praying that for the reasons stated in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition, directing the respondents to forbear from taking any

1. (1933) 65 M.L.J. 781.

*W.P. Nos. 242, etc. of 1965. 18th July, 1966.

proceedings under the Madras Land Reforms (Fixation of Ceiling on Land) Act LVIII of 1961 in respect of the lands more particularly described in Annexure 'A' to the petitioners' affidavit filed with the petition, etc.

V Vedantachari, T. R Srinivasan, S M Subramaniam, Habibullah Badsha, R. G. Rajan, K Parasaran T. M Chinniah Pillai, V Sridevan, R. Mathrubutham, K. S. Champakesa Iyengar, K K Venugopal, R Sundaralingam, S Annadurai, M. M Ismail, K. Ramaswami, K Narayanaswami and *M. R Narayanaswami*, for Petitioners

K Venkataswami, for the Additional Government Pleader, for Respondents.

The Order of the Court was made by

Veeraswami, J—These petitions pertain to problems relating to section 22 or section 9 (2) (*b*) of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 Section 22 covers transactions which took place between 6th April, 1960, and 2nd October, 1962 It appears that the State Government issued administrative instructions to Authorised Officers and others concerned as to how matters arising under that section should be classified for purposes of disposal. It is argued that notices issued by the Authorised Officers under section 22 keeping in view or being influenced by the said instructions of the Government should be quashed. It is obvious that the jurisdiction under section 22 is quasi-judicial and the officers entrusted with the jurisdiction should be left free to decide matters arising under section 22. No administrative instruction in the matter can properly be issued either classifying transactions which will fall within the purview of section 22 or giving any other indication as to how matters should be disposed of under section 22. The instructions issued by the Government, therefore, are highly objectionable. That being the case, we are of the view that notices which have been issued to the petitioners under section 22 were apparently influenced by the administrative instructions of the Government. No doubt it is argued for the State that the officers were not compelled to follow the instructions But we wonder which administrative officer will dare keep aside or disregard any instructions given by such high authority as the Government The presumption in such a case should necessarily be that the concerned officers acting under section 22 have been and must have been influenced by such instructions. The consequence is that the notices issued to the petitioners under section 22 will be vitiated on account of those instructions. We consider, therefore that those notices to the petitioners should be disregarded and if necessary, the officers concerned should, whenever they think so, issue fresh notices to such of the petitioners as they think proper In doing, so they should remember that they are vested with a quasi-judicial authority which they are bound to exercise without regard to any external or outside influence or instruction and that they should bring to bear on the merits their honest and independent mind in deciding controversial issues under section 22 We accordingly quash the notices issued to the petitioners under section 22 The concerned officers, if they issued fresh notice to any of the petitioners, will give proper and effective opportunity to them to file all their objections and fully represent their relative cases. These petitions are, therefore, allowed, but with no costs.

In regard to the other petitions which raise the question under section 9 (2) (*b*) of the Act, we are of the view that the concerned authorities must give fresh and proper opportunity to those petitioners aggrieved and dispose of the question under section 9 (2) (*b*) afresh.

In Writ Petitions Nos 1474 to 1479, 1754, 3792, 4492, and 4488 of 1965, it is said that the notices under section 9 assume or take it for granted that certain transactions which fell within the preview of section 22 are invalid and proceeded on that basis without there being an enquiry or an order under section 22. That, of course, is illegal The officers are not entitled to so assume. They can treat the transactions which fall within the purview of section 22 as invalid only after observing the procedure laid down by that section and making an order thereunder. These petitions are also allowed.

In Writ Petitions Nos 4870 and 4871 of 1965 and 14 of 1966, the last of the petitions complains that the transaction there in question, which was before the Act came into force, was taken to be invalid without giving any opportunity to the petitioner to make his representations in that regar Likewise, in the other two petitions no notice was given though the transactions in dispute were partly after the notified date. These petitions also are allowed. The petitioners will be given due notices and their objections heard before any order is made against them

In Writ Petition No 1398 of 1965, the petitioner contends that it is a public trust, not covered by the Act and that in spite of that fact being brought to the notice of the authorities, they have showed inclination to proceed under its provisions. In view of the contention that the institution is a public trust, in which case, as it is said it will fall outside the purview of the Act, it is for the petitioner to institute a suit if so advised, for a declaration as to the character of the institution and consequential reliefs. This petition is, therefore dismissed. C M P. No 7226 of 1966 in that petition is ordered.

In Writ Petition No 4841 of 1965 the complaint is that no proper notice was given to the petitioner in disposing of the matter arising under section 9 There appears to be substance in this contention. This petition is allowed and the matter will be disposed of afresh after giving the petitioner due opportunity

In Writ Petitions Nos 4842, 4843 and 4844 of 1965, there is no substance. They are dismissed

Writ Petitions Nos 2014 *and* 2134 *of* 1965 —These petitions again involve proceedings under section 9 (2) and it is said that though the husband died and this was brought to the notice of the concerned authorities, no fresh notice was served. It is represented on behalf of his widow that she will be prepared to file a fresh return if another opportunity is given We think that these petitions also should be allowed

Writ Petitions Nos 1237, 2712, 2908, 3867, 4230, 704 *and* 705 *of* 1965:—These petitions touch transactions which were effected at a time when Madras Act LVIII of 1961 was not in force on account of the fact that the Supreme Cout had struck it down as invalid In our judgment in Writ Petition Nos 1543 of 1964 and 1416 and 1473 of 1965 we have said that in view of the subsequent retrospective effect that has been given to the Act by Article 31-B of the Constitution, the authorities should take a reasonable view of the provisions of the Act and exercise restraint in rigidly enforcing them in such cases, keeping in view all the circumstances including the fact that at the time when the transactions were effected the Act was not in force. It is true that when once the law is declared to be retrospective, it may touch the transactions. But it does not follow from it that when the enforcement of the relative provisions will involve a penalty and a forfeiture, the provisions will be enforced strictly Wherever by reason of Article 31-B of the Constitution and the retrospective validation of the Act, the transactions which took place at the time when the Act was considered to be invalid are affected, a liberal view will have to be brought to bear in respect of those transactions and the matter dealt with as such. In other words, the provisions of the Act should not be enforced in relation to such transactions with a view to invoke penalty or forfeiture, the reason being that at the time the transactions were entered into, they were entered into *bona fide* and on the view rightly held that Madras Act LVIII of 1961 was not in force. These petitions are, therefore, allowed and the matters comprised in them will be disposed of afresh.

Writ Petition No. 3721 of 1965, is allowed only in so far as it relates to transactions which took place after the Supreme Court declared the Act to be invalid and before the Seventeenth Amendment came into force.

Writ Petition No 4649 *of* 1965 —It is said that C R P No. 902 of 1966 is pending disposal in this Court and that it covers the subject-matter of the Writ Petition. This petition is, therefore, dismissed The disposal of this petition will not in any way prejudice the petitioner in prosecuting the Civil Revision Petition or other remedies.

There will be no order as to costs in any of these petitions

V.K. —— *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M NATESAN.

C. S Ramachandra Rao .. *Appellant**

v.

P. Chinnaswamy Kandar and another . *Respondents.*

Easements—Common party wall—Rights of owners—Scope and limitations of—Procedure to be followed in case of proposed interference with a party wall

In the case of a common party wall each co-owner is entitled to a reasonable user of the wall owned in common and so long as each co-owner used it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes The other co-owner will have no cause for complaint unless the acts alleged amount to his ouster or to distruction of the party wall

It is a salutory rule to follow that owners of party wall who are desirous of adding to or otherwise materially interfere with the common property, should obtain the consent of the others interested in it, to the change being effected If the consent is unreasonably withheld it will be open to the party proposing to put up the construction to seek relief by way of injunction from the Court as withholding consent to any reasonable user will itself amount to ouster

Appeal against the Decree of the Court of the Subordinate Judge, Tiruchirappalli, dated 20th September, 1961, in Appeal Suit No 85 of 1961, preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 96 of 1959

V. C. Veeraraghavan, for Appellant

The Court delivered the following

JUDGMENT :—The plaintiff, in a suit for injunction with reference to a party-wall, is the appellant in this Second Appeal The only live issue for consideration in this Second Appeal is the plaintiff's claim to rest rafters of the building, which he proposes to put up, on the said common wall The plaintiff is the owner of the property (now a vacant land) south of the common wall and the defendants are the owners of the northern property Originally, both the properties belonged to a common owner and in an earlier litigation between the parties, it was held that the wall is a common wall. In fact, it is an admission in the earlier proceedings by the present first defendant that the plaintiff could exercise his *mamool* rights in the wall Of course, what those *mamool* rights were, were not defined In the earlier litigation, the finding, which has become conclusive between the parties, is, that the wall was held in co-ownership That matter came up to this Court in S A. No 2415 of 1948. The complaint then was the putting up of two windows in the wall by the present defendants Then this Court observed that, on the finding of the Courts below which had become final, both the plaintiff and the defendants held the wall in co-ownership, and one co-owner was entitled to alter the nature of the wall without the consent of the other co-owner, following the observations in *Kanakayya* v *Narasimhulu*[1].

The plaintiff in this case has not yet got ready plans of his proposed building. There is no clear evidence as to the nature or character of the structure he is going to put up and the extent of the support for the new building he required from the common wall In fact, there is evidence that the plaintiff was constructing a wall close to the common wall *AB* The trial Court observed that the plaintiff was not entitled to place any rafter on the common wall affecting the right of the defendants. The contention before that Court was that the plaintiff should not be allowed to rest his rafter on the common wall so as to jeopardise the defendants using the common wall. The lower appellate Court has observed that as the plaintiff is raising a wall by the side of the common wall he can rest the rafters or beams or anything he wants on this wall of his It is expressed by the lower appellate Court that it was very doubtful whether the common wall would stand the weight of the new building, which the plaintiff proposes to erect on his vacant site.

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*S.A No 1063 of 1962 22nd July, 1966.

1. (1896) I L R. 19 Mad 38

Mr V. C Veeraraghavan, learned Counsel appearing for the plaintiff-appellant, submits that the wall had been held in co-ownership, that is, in joint proprietorship and that so long as there was no detriment or damage to the wall, or to the defendants' enjoyment of the wall, as they are entitled to, he could rest his rafters on the common wall It is further submitted that the Courts below erred in denying all relief and in a way preventing the exercise by the plaintiff of such right as he had in the common wall. It is pointed out that the rejection of the claim for injunction may be construed as a denial of the plaintiff's rights in the common wall.

In my view, the plaintiff himself is responsible for having brought on himself the position He has not adduced in the trial Court evidence particularising the construction he was proposing to put up and the extent to which he proposed to submit the common wall to the burden of his new building Whether the wall, as it stands now, can stand the strain of the rafters which the plaintiff wants to insert, is a matter for consideration and decision It is stated for the defendants, and this is an aspect which has weighed with the lower appellate Court, that the common wall itself is an old wall and it is supporting the terrace of the defendants' building. If the plaintiff desires to make holes in the common wall to insert his rafters, it must be ascertained whether this will endanger the defendants' building and perceptibly weaken the support to his terrace. It is well-settled, that in the case of a party-wall, which is joint property of two neighbours, if one of them in the construction of his house inserts beams or pillars into the wall on his side the other owner has no cause for complaint unless the acts alleged amount to his ouster or to a destruction of the party-wall In this connection reference may be made to the decision of Chandavarkar and Aston, JJ , in *Kalishankar* v *Bai Kashi*[1], based on the principle that before a party could prevent any particular user of the common wall by his neighbour, he must establish ouster or the destruction of the party-wall by such user That was a case where the defendants inserted beams into the party-wall, the beams being supported also by pillars standing outside the party-wall, and the finding on the facts of the case that this did not amount to an ouster or destruction of the common-wall was accepted The question will ultimately depend on the facts of each case. What interference would amount to ouster or destruction of the common-wall or wrongful interference with the rights of the co-owner, will have to be determined as and when the occasion arises and on the facts of the case As is observed in *Baji Nath* v *Janki Prasad*[2], in the case of a party-wall each co-owner is entitled to reasonable user of the wall owned in common and so long as each co-owner used it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes.

In the present case, where the plaintiff has come to Court claiming injunction against the defendant's interference with his proposed constructions without informing the defendants specifically the nature of the construction which he proposes to put up In the absence of plans and specifications it would be impossible to determine whether the insertion of the rafters in the common-wall would be a reasonable user or weaken or endanger the defendants' building. In *Kanakayya* v. *Narasimhulu*[3], this Court laid down the proper approach to a case where one-co-owner of a wall intended to put up any construction. It was observed :

> " On further consideration, however, I have arrived at the conclusion that the better rule to lay down is the simpler one enunciated in *Watson* v *Gray*[4], since it will compel such of the owners of party-walls as are desirous of adding to, or otherwise materially interfering with, the common property to obtain before hand the consent of the others interested in it to the change being effected, and consequently is the one less likely to lead to disputes among joint holders of party-walls "

Of course, if the opposite party unreasonably withholds his consent, it will be open to the party proposing to put up the construction to seek relief by way of injunction from the Court. Withholding of consent to any reasonable user will itself amount

1 (1904) 6 Bom L R 682
2. A I R 1930 All 318.
3. (1896) I L R. 19 Mad 38 at 40.
4. (1880) L R 14 Ch D. 192.

to ouster. If consent is withheld to any particular proposal the Court will be in a position to consider whether the proposal would amount to wrongful interference with the rights of the objecting co-owner. It can judge whether it would weaken the common-wall or otherwise materially interfere with the objecting co-owner's user of it. As already stated, in the present case the plaintiff has rushed to Court and sought an injunction against the defendants without formulating specifically his proposals in regard to the putting up of rafters on the common wall. While the decisions of the Courts below completely rejecting the plaintiff's claim in a case where the common wall is the joint property of adjoining owners without any reservation, may not be maintainable, I do not think the Court can give any positive relief to the plaintiff in this case. It will be open to the plaintiff to intimate to the defendants the constructions which he proposes to put up and the user of the common-wall which he intends giving details, and if the defendants unreasonably withhold consent, the plaintiff would be within his rights in approaching the Court for necessary relief In all likelihood if the defendants find that their interests are amply safeguarded and security measures proposed that the wall does not get weak, they may readily consent without necessitating the plaintiff's resort to Court. Having made this position clear, this Second Appeal is dismissed. No costs. No leave.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Sami Naidu .. *Appellant**

v.

Pandaridas Reddiar and others .. *Respondents.*

Guardian and Wards Act (VIII of 1890), sections 24 and 43—Duty of guardian of the person of a minor girl—Sanction of Court sought for performing the marriage of a minor—Sanction refused—Marriage performed in disobedience of order of Court—If renders the marriage invalid or void

It is no doubt true that section 24 of the Guardian and Wards Act provides for the duties to be performed by the guardian of the person of a minor and the guardian is enjoined to look to the support, health and education of the ward and such other matters as the law to which the ward is subject requires The marriage of a minor, particularly that of a Hindu female, is one of the most important matters the guardian of the person must look to Section 43 of the Act provides for the Court passing orders on application for regulating the conduct of proceedings of any guardian and for enforcement of the orders passed

Where a Court guardian applies to the Court for permission to contract the marriage of a minor with the proposed spouse and the Court refuses the permission sought for on the ground that the ward is of tender age, still if the marriage is celebrated it cannot be said that such a marrige will be void and a nullity The marriage of a minor brought about in contravention of the Court order will not be invalid or void It may be that the guardian is liable to be proceeded against under section 43 (1) of the Act for disobedience of the order of the Court

Appeal against the Judgment of the Sub-Court, Cuddalore, in A.S No. 3 of 1961 against the District Munsif's Court of Villupuram in O.S. No. 533 of 1959.

G N Chary, for Appellant.

T. V. Balakrishnan and *N. Vanchinathan*, for Respondents.

The Court delivered the following

JUDGMENT —The attaching decree-holder as plaintiff in a claim suit having lost in both the Courts below has preferred this Second Appeal For money due by one Janakalakshmi Ammal on a promissory note executed by her on 22nd September, 1952 for a sum of Rs. 2,500 he filed the suit O S. No 277 of 1955 on the file of the District Munsif's Court, Poonamallee. He got the decree transferred to the District Munsif's Court, Villupuram for execution. Meanwhile Janakalakshmi Ammal died and her husband Krishnadoss and cousin Janakiammal were brought on record as her legal representatives. When the suit properties were attached in

*S A. No. 1209 of 1962. 22nd July, 1966.

execution of the decree by the transferee Court, a claim was put forward by the first respondent herein claiming title to the properties as purchaser from one Govinda Reddiar. This Govinda Reddiar claimed title to the properties as heir and legatee of his wife, Indrani, she being the daughter of Janakalakshmi Ammal, the executant of the promissory note on which the suit O S No. 277 of 1955 was filed. Indrani's title to the properties was based on a deed of settlement executed by the said Janakalakshmi Ammal on 14th October, 1940, nearly 12 years prior to the promissory note. Indrani had bequeathed the properties to her husband, Govinda Reddiar under a registered will evidenced by Exhibit B-2 (registration copy). The husband Govinda Reddiar conveyed the properties in favour of the first defendant under a sale deed Exhibit B-1 dated 16th August, 1955 for a consideration of Rs. 1,500. It may be pointed out that the first defendant's father Thulasi Reddiar had obtained sale of the properties from Janakalakshmi Ammal under Exhibit A-3 dated 29th June, 1953 and the first defendant obtained the sale deed from Govinda Reddiar, the husband of Indrani, subsequently, finding that there was dispute as to heirship of Indrani. The finding of the Courts below is that the first defendant has been in possession of the properties. The plaintiff's case was that Govinda Reddiar, the claimant's vendor, was not the husband of Indrani and could lay no claim to the suit properties, to effectively pass title to the first defendant. His case was that Janakalakshmi Ammal was the owner of the properties and on her death the properties passed into the possession of her husband Krishnadoss who had also been made a party defendant in O S No. 277 of 1955 For the plaintiff, reliance was placed on an order passed in a suit O S. No. 187 of 1951 on the file of the District Munsif's Court, Villupuram, rejecting the claim of Govinda Reddiar to be brought on record as the legal representative of Indrani, the Court holding that Govinda Reddiar was not the husband of Indrani This order was passed on 27th October, 1952 A revision had been taken against the said order to this Court and on revision the matter was remanded for further enquiry Pending the enquiry, Janakalakshmi Ammal herself died and her husband Krishnadoss who got himself impleaded as her legal representative did not press the matter further. Both the Courts below have found on ample and substantial evidence that Govinda Reddiar has been married to Indrani with all rites. Govinda Reddiar has given evidence as D W 1 of his marriage to Indrani which was performed according to sastraic rites.

One other matter may be noticed in this connection. During the minority of Indrani, Janakiammal, her mother's cousin, had been appointed as her guardian under the Guardian and Wards Act, in O P. No 13 of 1943 on the file of the District Court, Cuddalore On the death of Indrani Govinda Reddiar as the heir of the deceased applied in the District Court, South Arcot, for direction to the Court guardian Janakiammal to deliver possession of all the properties of Indrani to him, and this application was ordered by the District Court.

The findings of the Courts below that a marriage with all the necessary ceremonies to constitute a valid marriage took place between Indrani and Govinda Reddiar, is based on relevant and substantial evidence and is not open to challenge in Second Appeal. The recitals in the will of Indrani are confirmatory of the relationship between her and Govinda Reddiar.

An attempt was made in this Court to argue that Indrani could not have got title to the suit properties under the settlement deed Exhibit B-7, as it was a term of the settlement that she should marry one Kuppuswami Reddiar. The language of the document gave room for a possible construction that Indrani should marry Kuppuswami Reddiar, that they together should take the properties and that if either of them failed to marry the other, the recalcitrant party would have no interest in the properties But this was not the case with which the plaintiff came to Court. The plaintiff's case was built on the basis that on Indrani's death the properties passed on to her mother Janakalakshmi Ammal as heir and that Govinda Reddiar was not her husband. The contention now attempted will go against this case and in fact may defeat the plaintiff's claim. If the contention is accepted, it will be Kuppuswami Reddiar who will be the owner of the properties. However, it may be stated that even if the document is open to such construction, there is evidence

on record that it is Kuppuswami Reddiar who refused to marry Indrani The trial Court in these circumstances rightly observed that as Kuppuswami Reddiar did not wed Indrani in pursuance of Exhibit B-7, the latter became the absolute owner of the properties. The whole case of the plaintiff was built on Indrani being the absolute owner of the properties and she leaving on her death in 1952 her mother Janakalakshmi Ammal and her father Krishnadoss surviving.

In these circumstances the argument in Second Appeal turned round an episode during the guardianship of Indrani under Janakiammal, the Court guardian When Indrani was aged about 12½ years, Janakiammal as Court guardian applied in O P. No 13 of 1943 for the grant of permission to celebrate the marriage of Indrani with Govinda Reddiar This petition was dismissed on 11th October, 1943 and permission refused, as the age of Indrani at that time was only about 12½ years. It is notwithstanding this order of the Court refusing permission to have Indrani married to Govinda Reddiar, that the marriage was celebrated That marriage was celebrated in 1944 and it is made out in evidence that all the relations took part in the marriage. The argument now advanced is that as the Court refused permission for the marriage, the marriage subsequently celebrated must be held to be void and a nullity It does not appear from the judgments of the Courts below that the case in this form was presented there Of course it is now raised before me as a pure question of law. In my view there is little substance in this contention Learned Counsel referred to sections 24 and 43 of the Guardian and Wards Act (VIII of 1890). Section 24 provides that a guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires No doubt, the marriage of a minor, particularly that of a Hindu female, is one of the most important among other matters which the guardian of the person must look to. A more important aspect of the matter is that under section 41 (1) the powers of the Court guardian of the person cease in the case of a female ward, by her marriage to a person who is not unfit to be a guardian of her person or if the guardian was appointed or declared by the Court, by her marriage to her husband who is not, in the opinion of the Court, so unfit. Section 43 provides for the Court passing orders on applications for regulating the conduct of proceedings of any guardian and for enforcement of the orders passed. By section 43 (4) it is provided that in the case of disobedience to an oder passed under section 43 (1) or section 43 (2), the order may be enforced in the same manner as an injunction granted under the Civil Procedure Code is enforced. In the case of an order under section 43 (1) which may be on application by any person interested or by the Court *suo motu* regulating the conduct of proceedings of any guardian appointed or declared by the Court, the order is enforced as an order of injunction and as if the ward were the plaintiff and the guardian were the defendant In the case of an order under section 43 (2) which applies to a case where there are more guardians than one of a ward and they are unable to agree upon a question affecting his welfare and one of the guardians applies to the Court for direction, the order shall be enforced as if the guardian who made the application were the plaintiff and the other guardian or guardians were the defendants. In the present case the permission which the guardian sought had been refused by the Court on the ground that the ward was only about 12½ years old. The marriage had taken place about a year later, in all probability she must have completed 14 years of age by then as the Child Marriage Restraint Act (XIX of 1929) was in force. The ward's father and mother were alive and it is nobody's case that the marriage was forced or brought about fraudulently by anybody My attention was drawn by Mr G N Chari, learned Counsel for the appellant to *Moniyan Bibi* v. *Dt. Judge, Birbhum*[1], where it is observed :

> This clearly indicates the desirability, if not the absolute necessity, of the sanction of the Court, before the marriage is arranged and solemnised We hold accordingly that a ward of Court cannot marry without the consent of the Court This indeed has been recognised as an elementary

1. (1915) I.L.R. 42 Cal. 351, 358.

principle in the law of England This view was accepted as applicable to the case of a Hindu minor for whom a personal guardian has been appointed by the Court in *Subadra Koer* v *Dhajadhari Gowswami*[1] where it was ruled that marriage or connivance at marriage with a ward of Court, without consent of the Court, is a contempt of Court liable to be severely punished "

But this decision is not authority for the contention that the marriage itself is void and a nullity, nor does the decision of this Court in *Kuppammal* v. *Rangaswami*[2], whereunder the aforesaid decision of the Calcutta High Court has been referred to with approval, in the least advance the case of the appellant. This Court was there dealing with an application for permission of the Court for the marriage of the minor The trial Court had refused it and this Court referring to the true perspective of approach in such matters directed that on the facts of the case the permission sought should be accorded. In *Subhadra Koer* v *Dhajadhari Goswami*[1] referred to by the Calcutta High Court, the marriage of the minor had taken place in contravention of the Court's order. The question was whether action could be taken against the guardian under section 43 (4) It was contended for the guardian that as the marriage performed in accordance with the rules of Hindu Law could not be set aside, the order which was originally issued upon the guardians and had been disobeyed by them could no longer be enforced and consequently they were not liable to be punished in the manner contemplated in clause (4) of section 43 With reference to this argument, the learned Judges observed:

"The sub-section 43 (4) is not limited solely to cases where an irremediable mischief has not been done and where, therefore, the *status quo ante* might be restored , it applies to all cases of disobedience, whether are not the effect of the disobedience is capable of removal or reparation "

The learned Judges take it for granted that the marriage is not void. In Mayne's Hindu Law, 11th edition, it is stated at page 141 :

"Even where the marriage is in contravention of an injunction or order of a Court obtained at the instance of the guardian having the preferential right, nevertheless, it has been held that the marriage, when once solemnised, is valid "

At page 162 of the same volume the principle is thus set out :

"The doctrine of *factum valet*, rightly interpreted, is particularly applicable in connection with questions relating to marriage and adoption The general principles are stated in several cases The application of the maxim must be limited to cases where there is neither want of authority to give or to accept nor any imperative interdiction , or where there is no force or fraud A marriage actually and properly celebrated is legal and binding, although it has taken place in violation of a previous agreement to marry another person , or although it has been performed without the consent of the person whose consent ought to have been obtained "

Similar observations are found in Mulla's Principles of Hindu Law, 12th edition, at page 608 :

"Whatever the correct view may be, the rule established by the decisions is that a marriage which is only solemnised, and is otherwise valid, is not rendered invalid, because it was brought about by mis-representation to the guardian or without the consent of the guardian for the purpose of marriage, or in contravention of an express order of the Court But a marriage though performed with the necessary ceremonies, may be set aside by the Court, if it was brought about by force or fraud "

In *Bai Diwali* v. *Moti Karson*[3], the learned Judges observed :

"Bai Diwali was no doubt guilty of disobeying the order of the District Judge , but neither that circumstances by itself, nor the disregard of the preferable claim of the male relations invalidate the marriage "

In *Brindaburn Chandra Kuurmakar* v. *Chandra Kurmakar*[4], pending a suit for custody of a minor girl when there was an injunction prohibiting the mother from getting the girl married, the mother gave away the girl in marriage with all necessary marriage rites. The learned Judges held in the circumstances that the marriage rites having been gone through by the mother and natural guardian and there being no fraud, the doctrine of *factum valet* prevailed and the absence of the legal guardian's consent did not invalidate the marriage Again in *Khushalchand Lalchand* v *Bai Mani*[5], where the mother celebrated her daughter's marriage with due ceremonies without the consent of the father and when an injunction by the

1. (1912) 15 C L J 147
2. (1960) 1 M L J 273 I L R. (1960) Mad 94 : A.I R 1960 Mad 287.
3. I L R (1898) 22 Bom 509 at 512.
4. I L R (1886) 12 Cal 140.
5. I L R. (1887) 11 Bom 247.

Court was in force, the validity of the marriage was upheld The above two case have been considered as good authority by this Court in *Venkatacharyulu* v. *Rangacharyulu*[1], for the proposition that when the mother of a girl acting as her natural guardian in view to her welfare, and without fraud or force gave away the girl in marriage and the marriage rite was duly solemnised, the marriage was not to be set aside. Reference in this connection may also be made to the decision of the Allahabad High Court in *Munshiram* v *Emperor*[2], where in respect of a marriage in contravention of the Child Marriage Restraint Act it was observed

> "The Act aims at and deals with the restraint of the performance of the marriage It has nothing to do with the validity or invalidity of the marriage The question of the validity or invalidity of the marriage is beyond the scope of the Child Marriage Restraint Act Marriage is performed by the performance of certain ceremonies which depend on the race and religion of the parties who enter into marriage"

In *Moti* v. *Beni*[3], it is pointed out that the celebration of the marriage might be a contravention of the provisions of the Marriage Restraint Act; but the marriage will not be invalid, the Act merely imposing certain penalties on persons bringing about such marriage The validity of a marriage under the Hindu Law is dependent upon its due solemnisation according to the rites and regulated by custom and usage of the community recognised by law. The ward of a Court cannot be penalised and her future prospects blighted by declaring the invalidity of the marriage when there is no force or fraud in the matter. If third parties brought about the marriage in defiance of the orders of Court, they may be punishable for contempt or otherwise But the liability of these persons to be penalised will not make the marriage a nullity if it is legal and valid according to the personal law of the parties

In the result, the Second Appeal fails and is dismissed. No costs. No leave.

R M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M ANANTANARAYANAN, *Chief Justice.*

K. Venkatasamy Nayagar .. *Petitioner**

v.

Union of India, represented by the Superintendent of Post Offices, Madras City, North Division .. *Respondent.*

Madras Buildings, Lease and Rent Control Act (XVIII of 1960), *section* 4 (3) (b)—*Fixation of fair rent—Allowance of ten per cent depreciation even in cases of new buildings of less than ten years old—Propriety*

Words and Phrases—'Depreciation'—What is

It is no doubt true that under the provisions of section 4 (3) of the Rent Control Act the cost of construction is to be arrived at according to the formula provided under the relevant rules and the schedule governing the same and even in cases where a building is only two years old a minimum depreciation of ten per cent is to be allowed There is nothing inequitable in this and the formula is not inconsistent with the intendment of the Act The Rent Control Act is only a temporary Act and it cannot therefore be said that the rule of depreciation as followed over the years will render the cost of a building nominal

The word 'depreciation' means loss or decline in value which occurs gradually over the useful life of a material due to physical wear, tear and decay Hence it is not only justified but scientific to allow a minimum depreciation even in case of new buildings

Petition under section 25 (1) (*a*) of Madras Act XVIII of 1960, against the order of the Small Cause Court, Madras, in H. R A. No 47 of 1962, H R.C No. 107 of 1962, Rent Controller, Madras

V. Venkataraman, for Petitioner

K. Venkataswami for the Government Pleader, for Respondent

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1 I.L R (1891) 14 Mad 316 1 M L J 85.

2 I L R (1936) 58 All 402

3. A.I.R. 1936 All 852, 853

* C R.P. No. 1628 of 1963. 16th September, 1966.

The Court made the following

ORDER —This revision proceeding involves a point of considerable interest with regard to fixation of fair rent under section 4 (3) (*b*) of Madras Act XVIII of 1960 My attention has not been drawn to any precedent of this Court, in which point has arisen for determination in the particular form with which we are now concerned.

Briefly stated, the facts are that the revision petitioner (landlord) and the Union of India represented by the Superintendent of Post Offices, North Division, Madras-6 (respondent) both went to the Rent Control Court for fixation of fair rent for premises No. 29, Kalamandapam Road, Royapuram Actually, the parties were content to have the matter of fair rent adjudicated, on admitted facts. The front portion of this building is occupied by the Kalamandapam Post Office, and the rear portion by the Postmaster for residential purposes. Admittedly, the front portion has to be classified under the first class, with regard to the rules for determination of fair rent, as it is a new structure built for the very purpose of housing the Post Office. The point that now arises is whether the Courts below were justified in allowing for depreciation of this building in the assessment of fair rent when (1) the building was a new structure and (2) in the statement by the respondent, no claim had been made under the head " depreciation " as such

Under section 4 (3) (*b*) (i) of the Act, the cost of construction has to be calculated under the Rules " less depreciation at such rates as may be prescribed " The formula for working out the fair rent is to be found under rule 14 of the Rules framed under the Act, read with Schedule II Schedule II gives the standard rates of depreciation. *Illustration A* is to this effect

"For a building of type I aged only 2 years—depreciation shall be 10 per cent and not 2 per cent "

The Courts below, therefore, felt constrained to allow for the minimum depreciation of ten per cent. under the Act, the Rules and the Schedule, that I have referred to. The Courts were of the view that the fact that the Government did not refer to this head of allowance at all, in their statement, did not absolve the Courts from their duty of determining fair rent under the Act and Rules.

The learned Counsel for the landlord (revision petitioner) has pressed two arguments in the main. The first is that when section 4 (3) (*b*) (i) refers to ' depreciation ', the Statute implies that depreciation must have actually occurred; it has no reference to any depreciation that has not taken place at all Hence, the rule and Schedule II are not in accordance with the Act, and are in conflict with the intendment of the Legislature in enacting section 4 (3) (*b*) (i), when the formula of the Schedule provides for a minimum depreciation of ten per cent. even with respect to a building only two years old This is the main and important argument. The susbsidiary argument is practically an argument of estoppel When the State did not claim any depreciation in its statement, the Courts were in error in making allowances under this head.

I shall deal with the first argument immediately, for that seems to me to be the interesting point, on which I must confess that no authorities would appear to be available. The word ' depreciation ' is to be be found annotated or defined in a number of technical works, but I have been able to come across only two definitions that are at all helpful to the present context. In Corpus Juris Secundum, Volume 26-A, page 492, the content of the word is expressed as follows :—

"The word depreciation means loss or decline in value which occurs gradually over the useful life of material thing, due to physical wear, tear and decay "

The Shorter Oxford Dictionary defines depreciation simply, as ' lowering of value '. It will thus be seen that ' depreciation ' has two aspects A material object might already have suffered depreciation, depending on its age; that degree of depreciation is relevant, when assessing the minimum marketable value of the article But it is also subject to future depreciation, and this would be relevant where a value is fixed which is to prevail in future also It is not disputed that, under the scheme of the Act, the fair rent once fixed will continue to govern the relationship between the parties under the Act, only subject to changes as allowed

for under section 5 of the Act. Hence, it appears to me to be entirely justified and further a scientific procedure to allow for depreciation even with regard to a branp new building. I am unable to hold that the rule and Schedule II are in conflict with the intendment of the Act, or that the expression is limited in its connotation to the lowering of value already suffered by the building.

The second point or ground of objection is a short one, and can be immediately disposed of No doubt it would have been better if the State had amended its claim statement by introducing some such words as "in accordance with the rules and the formula of Schedule II under the Act etc." But the State did claim a fair rent which was definitely below the rent determined by the first Court, which was increased on appeal by the tenant Hence the argument has no substance that the discount with regard to the depreciation embodied in the formula ought not to have been allowed, because there is no reference to this item in the statement filed by the respondent

There is a final argument of some interest, submitted by the learned Counsel for the revision petitioner This is to the effect that the formula, as it stands, is substantially inequitable, it can be shown that if this formula is applied over a period of years, using the mathematical mode specified, a building that may be worth a few lakhs in the year of construction, may be worth almost a nominal amount by virtue of the mere factor of depreciation, if a sufficiently long period is taken into consideration. But it must be remembered that the Rent Control Act itself is a temporary Act, which the Legislature extends from time to time; it is not intended as a permanent contribution to the corpus of the law Presumably, this was kept in mind when this formula was devised.

This revision petition, therefore, fails and is dismissed. In the circumstances there will be no order as to costs.

R.M. — *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

Durairaj *alias* Paramasivam and another .. *Petitioners**

v.

P. M S. Rathana Bai .. *Respondent*

Madras Buildings, Lease and Rent Control Act (XVIII of 1960), *section* 10 (2) (i)—*'Wilful default'—What amounts to—Burden of Proof*

There is a sharp distinction between 'default' and 'wilful default' and the Legislature is presumably conscious of the distinction when it makes only a wilful default in payment of the rent as a ground for eviction under the Rent Control Act The inter-relation between the act of default and the explanation put forward by the tenant may be stated thus (*a*) The fact that the tenant commits default and puts forward a true explanation therefor , does not necessarily mean that the default is not wilful The explanation may be true and still the default may be wilful (*b*) Equally a tenant in default may put forward an explanation which is false and still the default may not be wilful at all That would depend on the circumstances and probabilities in each case (*c*) The fact that the explanation is false does not either imply that the default is not wilful (*d*) It would equally follow that a true explanation might show that the default is not wilful.

Where the evidence in the case discloses that the relationship between the parties was unpleasant and had led to criminal proceedings, the oral evidence being unreliable,the benefit of the doubt should be awarded to the tenant and the burden lies heavily on the landlord to prove the circumstances which would justify the inference that the default committed was wilful If there is any doubt about it and the version of the tenant that he or she did make some attempt to send the rent to the landlord may be conceivably true, the Court should be careful before making an order for eviction

Petition against the Order of the District Court, Madurai, in C R P No. 23 of 1963—C M.A. No 17 of 1962, Sub-Judge, Madurai, against H R. C. O. P. No. 14 of 1961, Rent Controller, Tirumangalam.

R Gopalaswami Iyengar, for Petitioners.

V. Thyagarajan for *S. M Abdul Wahab,* for Respondent.

* C R P. No 2137 of 1965. 6th October, 1966.

The Court made the following

ORDER.—This proceeding for eviction under the Rent Control Act has had a considerable and protracted history, and, at one stage, it came up to this Court in C.R.P. Nos. 710 of 1963 and 507 of 1964 which were dealt with by Ramamurthi J., in January, 1965. But in view of the very restricted compass of this disposal of the matter that I am making, I shall content myself with a statement of the essential situation. The case is also of some interest for the citation of authority by the learned District Judge, in revision, upon the question of the ingredients of 'wilful defaut' as occurring in the Rent Control Act. There would appear to have been some confusion or misconception in that matter, which appears to merit a certain clarification.

We may take it that relations between the parties, *viz.*, the tenant who is a lady who took the premises on lease in December, 1950, and the landlord, deteriorated very considerably after the tenant instituted a police complaint against the landlord for alleged insult and abuse, which ended in an acquittal. The premises were to be used for running a dispensary called Ratna Bai Clinic and the tenant (R.W. 1) was not a qualified doctor but was largely relying upon her niece, one Devaki, who was to be placed in charge of the clinic. The tenant did file a complaint against the landlord for assault and trespass, as well as insult, and the record shows that there were very bitter feelings between the parties. The only question is whether the tenant committed 'wilful default' in payment of rent, for the premises, for the period December, 1960, January, 1961 and February, 1961. It is pertinent here to note that the premises were demised to the tenant on 1st December, 1960, on a monthly rent of Rs. 45. Curiously enough, the landlord claims that an advance of Rs. 45 alone was paid while the tenant claims that she paid an advance of Rs. 500.

I am now concerned with the order of the learned District Judge in revision, and the learned District Judge rightly addresses himself to the only question which was before him, and which had to be extricated from the mass of the material concerning the regrettable relationship between the parties which led to criminal proceedings etc. that was the question whether the rents for December, 1960, January, 1961 and February, 1961 were actually paid by the tenant, or whether she committed 'wilful default' in the payment of these rents.

It is not in dispute that the tenant sent the rent for March, 1961 by money order, and also subsequently in June, and that there were two refusals of this money order by the landlord. On 20th June, 1961, the landlord sent the letter Exhibit P-1 claiming that no rent had been paid for December, 1960 and January, and February, 1961, and that that was the reason for the refusal of the subsequent money orders. Unfortunately, these statements cannot be relied upon, as any index of the truth. By that time, criminal proceedings had been instituted by the tenant, and the feelings of the landlord must have been bitterly adverse to the tenant. That the landlord did not earlier claim that rents for the crucial three months had not been paid, is not without significance. However, that is not conclusive, for the simple reason that the landlord may well have waited, thinking that the rent would be subsequently paid, till some incidents led to a startling deterioration in the relationship between the parties.

With regard to the law on the subject, the following authorities have been referred to by the learned District Judge and I shall confine myself to them *Rangaraju* v. *Parthasarathi*[1], *Lakshmi Ammal* v. *Gurunathan*[2] and *Khivraj Ghordia* v. *Maniklal Bhattad*[3]. The last was a decision of Ramamurthi, J., and the Judge made two observations, which I am quoting here, as I find myself in entire agreement with them. The first is this:

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1. (1964) 1 M.L.J. 12.
2. (1956) 2 M.L.J. (S.N.) 31.
3. (1965) 78 L.W. 352: A.I.R. 1966 Mad. 67.

"The principle that emerges from the several decisions is that for default to be regarded as wilful default, the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay the rent, or reckless indiffrence "

The second observation is to the effect that—

"Certain pleas raised by the tenant, but negatived by the Court on assessment of the evidence adduced by the landlord and the tenant may constitute proof of *bona fides* on the part of the tenant, as to rule out any theory of wilful default "

In other words, there is a sharp distinction between 'default' and 'wilful default', the Legislature, presumbabely, was very conscious of this distinction, when the Rent Control Act laid it down that mere 'default' however prolonged or established, was not a ground for eviction, but that 'wilful default' was alone a ground for eviction As decisions of this Court have earlier stressed, such criteria as 'supine indifference' or 'callousness' have been considered as significant. Further, it was held in *Lakshmiammal* v *Gurunathan*[1], that the mere fact that the tenant put forward false defences at the time of the hearing of the petition, will not be sufficient for the Court to hold that that default was "wilful " But this dictum seems to have somewhat misled the learned District Judge into thinking that where the tenant puts forward a defence, which is found to be false, in respect of the default, this might exclude the inference that the default was 'wilful.' In order to obviate all confusion upon this relationship between a false defence and the existence of a 'wilful default' I think that the following proposition may be enunciated (1) The fact that the tenant commits default, and puts forward a true explanation thereafter, does not necessarily mean, that the default is not 'wilful 'Wilful default' will have to be judged upon the index or basis of a conscious failure of the tenant to pay rent, without any justification which the Court can accept as taking away the element of 'wilfulness'. The explanation may be true, therefore, and still the default may be 'wilful' for the simple reason that the explanation may not be acceptable, as showing that the default was not 'wilful'. (2) Equally, a tenant may put forward an explanation which is false, and still the default may not be 'wilful' at all. That would depend entirely on the surrounding circumstances and probabilities (3) But the fact that the explanation is false, does not imply that the default is not 'wilful.' A defaulter may both be guilty of 'wilful default' and may put forward a false explanation for the failure to pay rent, this is fairly obvious, and this possibility seems to have been missed in the analysis by the learned Judge. (4) It would equally follow that the tenant may put forward a true explanation, and that this may show that the default was not 'wilful.' No further explanation will then be called for.

In the present circumstances, after a careful scrutiny of the record, I am convinced that the learned Judge was not incorrect in his conclusion that the default cannot be termed 'wilful' It must be noticed that the premises had just been demised to this lady, and that she had paid an advance It is difficult to believe that, for the immediate three months succeeding the demise, the lady made no attempt to pay any rent. The claim of the landlord that these rents had not reached him was made only in Exhibit B-1 after criminal proceedings between these parties had started. Of course, the money actually never reached the landlord, and the default is a fact, it is the finding of the Courts below, at all stages. But, I think that it is possible that the case of R W. 2 may be true that the moneys were given to him for payment to the landlord by the tenant, as it was his original intervention which had brought about the tenancy In any event where owing to the subsequent very unpleasant developments, the oral evidence on each side is confused, discrepant and unreliable, I think that the benefit of the doubt should be awarded to the tenant Very similar observations were made by Ramamurti, J., in a passage succeeding the passage I have quoted in *Khivraj Ghordia* v. *Maniklal Bhattad*[2], and, while with respect to the learned Judge, I might not be able to agree that the application of the tenant must necessarily have to be rejected "as utterly worthless or wholly false," before the inference could be drawn, nevertheless, I do not think

1 (1956) 2 M L J (S N) 31

2 (1965) 78 L W 352 A I R 1966 Mad 67.

it can be doubted that the burden lies heavily on the landlord, to prove the circumstances which would justify the inference that not merely had a default occurred but that the default was 'wilful'. If there is any doubt about it, and the version of the tenant that he or she did make some attempt to send the rents to the landlord may be conceivably true, the Courts should be careful about coming to the opposite conclusion, and thereupon ordering eviction Therefore, I agree with the learned Judge in the conclusion that the ' wilful ' character of the default in respect of these premises does not satisfactorily emerge from the probabilities, and the evidence, therefore the tenant ought to be given the benefit of the doubt on that aspect There was, admittedly, default, but it cannot be said that this default was " wilful " within the meaning of the Act.

It follows, that the revision will have to be dismissed In the judgment in the Civil Revision Petitions that I have earlier referred to, Ramamurthi, J has ordered C R P No. 807 of 1964 which apparently was for re-delivery of the premises, since it appears that some other tenant has been inducted into possession, during an intermediate stage of the proceedings The learned District Judge stated that as C R P. No 807 of 1964 had been allowed " it would be open to the tenant hereafter to take re-delivery of the property as the order of eviction has been set aside." This seems to be the correct decision, and the further stages will have to be worked out in consonance with the provisions of the Act and in accordance with the principles that parties must be restored to the rights which they possessed, if those rights have been confirmed in these proceedings. No order as to costs.

R M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. VEERASWAMI.

Syed Mohamed, Badralam .. *Petitioner**

v.

Revenue Divisional Officer, Madurai, and others .. *Respondents*

Land Acquisition Act (I of 1894), section 18—Scope of jurisdiction of Court under—If can compel the Land Acquisition Officer to deposit the amount in Court

Section 18 of the Land Acquisition Act only enables the Court to determine the questions relating to extent of land, quantum of compensation, the person to whom the compensation is payable and the apportionment thereof among the persons interested These strictly are the limits of the jurisdiction of the Court to which a reference has been made under that section and the Court will have no jurisdiction to call upon the Land Acquisition Officer to deposit the amount, though the Officer improperly disbursed the amount contrary to the express provisions of section 31 (2) of the Act ignoring that there was a dispute as to the person entitled to the same

Deputy Collector, Cocanada v *Maharaja of Pithapuram*, (1926) 50 M L J 412 A.I.R 1926 Mad 492 (1), explained

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Sub-Court, Madurai, in I A No 51 of 1963 in O S No 27 of 1963.

P. Sharfuddin, for Petitioner.

K. Venkataswami for The Additional Government Pleader, for Respondent 1

C. A. Mohamed Ibrahim, for Respondent 2

The Court made the following

ORDER—This petition is directed, against an order of the First Additional Subordinate Judge, Madurai, dismissing an application by the petitioners to direct the Revenue Divisional Officer, Madurai, to deposit a certain sum of money representing compensation awarded in land acquisition proceedings with the usual solatium into the Court to which a reference had been made under section 18 of the Land Acquisition Act The Court below thought that it had no power to do so.

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* C R P. No 1860 of 1963 7th October, 1966.

It seems to me that the Court below was right in its conclusion. It is no doubt true that where there is a dispute as to the title to receive the compensation, or as to the apportionment of it, the Land Acquisition Officer or the Collector, as the case may be shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted There was in this case such a dispute before the Land Acquisition Officer. Nevertheless, for reasons not obvious to this Court, the amount or compensation had been disbursed by the Land Acquisition Officer to the second respondent. The reference under section 18 has been made at the instance of the petitioners. In fact, they had to come to this Court under Article 226 of the Constitution in order to compel such a reference Pending the reference, as I said, the petitioners applied to the Court below for an order directing the Land Acquisition Officer to deposit the compensation amount as required by section 31 (2).

There is not the slightest doubt that the Land Acquisition Officer in spite of the mandatory provision, namely, section 31 (2), disbursed the amount in disobedience of the direction contained in that provision But the question is whether the Court to which a reference has been made under section 18 has jurisdiction to compel the Land Acquisition Officer to deposit the amount in Court. On that question, it is clear the jurisdiction of the Court below has to be determined entirely in terms of section 18 That section enables the Court only to determine the questions relating to the measurement of the land, the quantum of compensation, the persons to whom the compensation is payable or the apportionment thereof among the persons interested Those strictly are the limits of the jurisdiction of the Court to which a reference has been made under that section It is obvious, therefore, that the Court below while acting under section 18 will have no jurisdiction to call upon the Revenue Divisional Officer to deposit the amount, though such officer, as I said, in disobedience of section 31 (2) has improperly disbursed the compensation, ignoring the fact that there was a dispute as to who among the claimants was entitled to receive it

Mr Sherfuddin for the petitioners contends that the Court below could well have ordered the Land Acquisition Officer to make the deposit In support he invites reference to *Deputy Collector, Cocanada* v *Maharaja of Pithapuram*[1], and *Chikkanna* v. *Perumal*[2] In the first case all that was decided was that if on a reference under section 18 the Court directed the Government to pay any portion of the compensation to a specified person, that would not call for any interference. But in the course of the judgment, Wallace and Madhavan Nair, JJ., pointed out

"We think that Government was bound, under the provisions of the Land Acquisition Act to have ready in the District Court the amount awarded by the Referring Officer, for distribution according to the decision of the District Court If the District Court had in a proper reference increased the amount of compensation Government is bound to pay into Court the amount of increased compensation The principle is not altered when an apportionment of the compensation amount is increased and if the Referring Officer had obeyed section 31, the necessary money would have been there It is not right that Government should throw on a party, whose property it has compulsorily acquired the risk and burden of recovering the compensation from someone else to whom Government has wrongfully paid it "

I respectfully agree with these observations, as indeed I am bound by them But this decision is no authority for the proposition that where section 31 (2) has not been complied with, the Court to which a reference under section 18 has been made can compel the Government to deposit. But this is not to say that in exercise of its jurisdiction under section 18 the Court below cannot proceed to decide as to which of the claimants will be entitled to the compensation If and when a decision is come to by the Court below that a claimant other than the one to whom payment has already been made is entitled to receive the compensation, whether the person who is so entitled to receive can compel the Government to deposit the amount and if so, through what means, does not call for decision at this stage It is not as

1 (1926) 50 M.L J 412 A I R 1926 Mad 492 (1)

2 I L R (1940) Mad 791 (1940) 1 M L J. 732 A I R 1940 Mad 474

if in such a contingency the petitioners will be without a remedy and they should be compelled to a suit to recover the amount from the Government. The petitioners fail now only because the Court below while acting under section 18 and before it comes to a conclusion on the reference will have no jurisdiction to compel the Land Acquisition Officer to deposit the compensation amount

The petition is dismissed, but in the circumstances with no costs

R M *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE T VENKATADRI

M Kuppuswami . *Petitioner**

v

The Special Tahsildar (L A) II Industrial Estate, Ambathur, at Saidapet, Madras . *Respondent*

Land Acquisition Act (I of 1894), section 3 (b) and sections 18 and 30—"Person interested"—Who is—When could ask for reference of the dispute of civil Court

The expression 'person interested' as defined in section 3 (*b*) of the Land Acquisition Act is a very comprehensive one and is held to inlcude all persons claiming an interest in the compensation to be made on account by the acquisition of land under the Act It should be liberally interpreted and will include even a person interested in the compensation money without having an interest in the land in a strictly legal sense of the term The definition does not purport to be exhaustive either It is immaterial whether there was any substance in the claim made by the person and the Collector is bound to treat every person who claims the compensation as a person interested, irrespective of whether the claim is valid or not The Collector has no power to finally adjudicate upon the rights of conflicting claimants Hence even a person claiming a right under an agreement to sell has a right to seek a reference under sections 18 and 30 of the Act to the civil Court and the Land Acquisition Officer cannot refuse to make the reference on the ground that such a person is not one interested in the acquisition

Petition under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the respondent, Special Tahsildar (Land Acquisition), Industrial Estate, near Avadi, Guindy, Chingleput District

Sharfuddin, for Petitioner

The Assistant Government Pleader, for Respondent

The Court made the following

ORDER —This is a petition in the nature of a writ of *mandamus* to direct the Special Tahsildar (Land Acquisition), II Ambattur at Saidapet, to refer his application dated 14th November, 1963 to the civil Court under sections 18 and 30 of the Land Acquisition Act, inasmuch as he is a person interested in the amount and in the apportionment of the compensation awarded

The petitioner is an employee of the Dunlop Rubber Co He and a few other employees of the company struck a bargain with one Pichai Pillai and his three daughters, the owners of the land acquired in the land acquisition proceedings. by entering into an agreement of purchase on 27th August, 1962 for a consideration of Rs. 27 750 In pursuance of the agreement, the petitioner paid a sum of Rs 3,000 at the time of the registration on 27th August, 1962. Subsequently he invested a further sum of Rs 4,000 towards preparing a blue print and making out a lay-out consisting of 35 plots of building sites of various dimensions with park and playground. The roads were also laid out and gravelled and the sites plotted with survey stones

While so, the Government published a notification under section 4 (1) of the Act that the petitioner's lands along with other lands were needed for the purpose of establishing the industrial estate near Avadi The petitioner sent an application to the director of Industries and Commerce requesting him to exempt the acquisition of the lands concerned in this writ petition, or in the alternative that the sum of Rs 18,251 paid as sale consideration might be awarded as compensation.

* W P No 1472 of 1963 7th October, 1966.

Nonetheless, the land acquisition proceedings continued by the issue of notices to the petitioner under sections 6 and 9 of the Act calling upon him to vacate and deliver possession Finally an award was passed on 12th September, 1963 of which the petitioner had no notice The petitioner came to know of the award on 3rd November, 1963 and on 4th November, 1963 sent an application to the Land Acquisition Officer under sections 18 and 30 of the Act requesting him to refer the matter to the civil Court, as he was a person interested in the amount and in the apportionment of the compensation awarded The Land Acquisition Officer refused to consider his application, on the ground that he was not a person interested in the award and that hence his request for a reference under section 30 could not be considered The petitioner, has therefore, filed this petition under Article 226 of the Constitution of India praying that a writ may issue directing the Special Tahsildar to refer his application to the civil Court

The only question for consideration therefore is whether the petitioner is a person interested, as defined in section 3 (*b*) of the Land Acquisition Act

The definition section says that the expression 'person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act. The expression 'person interested' is very comprehensive and it does not profess to give an exhaustive definition The expression 'person interested' has been interpreted by various Courts, and the trend of the opinion seems to be that I should give a liberal interpretation. The earliest case on the point that comes to my mind is *Pestonji Jehangir Modi*, In re,[1] where Justice Maclead said:

"Under section 3 (*b*) the expression 'person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act It is quite possible that a person may be interested in the compensation money without having an interest in the land in the legal sense of the term "

In *Chhutan Lal* v. *Mulchand*[2], the Punjab Chief Court had to consider whether a person who had entered into a valid agreement for the purchase of land was a 'person interested' within the meaning of section 3 (*b*) of the Land Acquisition Act. It observed that the expression 'person interested' as defined in the Act was wide enough to include the equitable interest In *Kako Bai* v *L A Collector*[3], it was observed that under section 3 (*b*) of the Act it was immaterial whether there was any substance in the claim made by the person applying under section 18 or not. In *State of Bihar* v. *Dr. G. H Grant*[4], it is observed thus :

" The 'definition of person interested in the land' according to the Act is not exhaustive What it really means is that it includes any person claiming interest in the amount of compensation whether it be a valid claim or not The Collector is bound to treat every person who claims compensation as an interested person He should include him in the award under section 14, even though he may award him nothing "

It is also useful to refer to the observations of the Supreme Court in *Grant* v *State of Bihar*[5].

" The Collector is not authorised to decide finally the conflicting rights of the persons interested in the amount of compensation , he is primarily concerned with the acquisition of the land In determining the amount of compensation which may be offerred, he has, it is true, to apportion the amount of compensation between the persons known or believed to be interested in the land, of whom, or of whose claims he has information, whether or not they have appeared before him But the scheme of apportionment by the Collector does not finally determine the rights of the persons interested in the amount of compensation , the award is only conclusive between the Collector and the persons interested and not among the persons interested The Collector has no power to finally adjudicate upon the title to compensation , that dispute has to be decided either in a reference under section 18 or under section 30 or in a separate suit "

On a review of the case-law on the subject, it seems to me that the expression 'person interested' does not require that a person must really have an interest in the land sought to be acquired It is enough if he claims an interest in compen-

1 (1913) I L R 37 Bom 76
2 (1917) 37 I C 822
3 A I R 1956 Punj 231
4 A I R 1959 Pat 343
5 (1965) 2 S C J 404 (1965) 2 M L J (S C) 29 (1965) 2 An W R (S C) 29 A I R 1966 S C 237, 244

sation, as distinguished from an interest in the property sought to be acquired As long as a person claims an interest in the compensation, he is a person interested within the meaning of the definition of that expression Even if a person denies the claim of the landlord, he is a person interested. Equal y, a person may be interested even though his title to the land is not admitted or his right to compensation is denied. A person, without having an interest in the land, may be a 'person interested' in the compensation money within the meaning of that expression Thus in the instant case, here is a person who has entered into a valid registered agreement to purchase property from the original owners of the property He has also paid a sum of Rs 3,000 towards the sale price He has also spent a considerable amount in improving the property Certainly when this property is acquired, he is also a person interested in the compensation amount. But this will not automatically create any right in the petitioner to claim compensation He will have to establish that he is also a person interested along with other persons to claim compensation Under the circumstances, the Collector has simply to forward his application under section 18 of the Act and leave the parties to fight out their respective claims in the civil Court The petitioner is, therefore, entitled to a writ of *mandamus* directing the Special Thasildar to refer the application of the petitioner dated 4th November, 1963 to a civil Court under sections 18 and 30 of the Act

The writ petition is allowed There will be no order as to costs.

R M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K SRINIVASAN AND MR. JUSTICE R. SADASIVAM

Mam & Co , Rayavaram, Tiruchirapalli District and others . *Petitioners**

v.

Forest Range Officer, Thuraiyur, and another *Respondents*

Forest Act (XVI of 1927), *section* 43 *amended by Madras Act (XXXVI of* 1961)—*If offends Article* 19 (1) (f) *and Article* 31 (1) *of the Constitution of India—Confiscation of vehicle used in committing a forest offence —If obligatory.*

In deciding whether a particular provision of a Statute violates the provisions of Article 19 of the Constitution and in applying the test of reasonableness prescribed under clauses (2) to (6) of the said Article the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time have all to be taken into consideration No abstract standard or general pattern of reasonableness can be laid down as applicable to all cases

Till the amendment of section 43 of the Forest Act by Madras Amendment Act XXXVI of 1961, it was held that the owner of the vehicle used in the commission of an offence under the Forest Act (similar to enactments like the Opium Act, etc) could get a return of the same if he proves that it was used without his connivance or knoweldge It was held that the Legislature did not intend to penalise even persons whose vehicles have been used by some one else for the commission of an offence It is reasonable to infer that the object of the confiscation of the vehicles used in committing offences is to prevent forest offences and this could be achieved without confiscating the vehicles of innocent persons Further an accused under the Act is given an option to compound the offence and a right of appeal is provided in respect of the property seized under the Act A person whose vehicle has been used without his knowledge cannot obviously take advantage of those provisions if it is to be held that the Court is bound to order confiscation of the vehicle in all cases The use of the word 'shall' in section 43 of the Act, as amended by the Act of 1961, does not mean that confiscation is obligatory It is a penal statute and it should be so construed that a person who has not committed any offence should not be visited with a penalty If the section made confiscation of the vehicle obligatory under any circumstances so as to affect the rights of innocent owners of vehicles, then the amending Act may have to be struck down as imposing an unreasonable restriction under Article 19 of the Constitution

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order of the Court of the District Magistrate, Tiruchirapalli, dated 5th May, 1965 and made in Crl M P. No 207 of 1965 (C C No 644 of 1962 on the file of the Sub-Magistrate, Perambalur), etc

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* Crl M P Nos. 2024 and 3266 of 1965 14th October, 1966

Fyzee Mahmood, S. Viswanathan and *T R Srinivasan,* for Petitioners.

Advocate-General for Public Prosecutor, for Respondents

When the petition came on for hearing before him the following Order of Reference to a Bench by

Sadasivam, J—The main question to be considered in this petition is whether section 43 of the Forest Act as amended offends the right to property guaranteed under Articles 19 (1) (*f*) and 31 (1) of the Constitution of India This question has been considered by Kailasam, J., in Crl M P No. 2290 of 1964, and answered in the negative But as the question is an important one and some relevant considerations do not appear to have been brought to his notice, I consider it fit to refer this question to a Bench, and in doing so, I shall briefly advert to the said considerations

Section 43 of the Forest Act originally stood as follows :

" When any person is convicted of a forest offence, all timber or forest produce in respect of which such offence has been committed, and all tools, ropes, chains, boats, vehicles and cattle used in committing such offence, shall be liable, by order of the convicting Magistrate, to confiscation Such confiscation may be in addition to any other punishment prescribed for such offence "

But the section was amended by Madras Act XXXVI of 1961 by substituting the words " shall be confiscated to the Government " for the words " shall be liable, by order of the convicting Magistrate, to confiscation " The words " such confiscation may be in addition to any other punishment prescribed for such offence " were omitted

The car MDT No. 3625 was confiscated in C C No 644 of 1962, on the file of the Court of Sub-Magistrate, Perambulur, on the ground that it was used as a vehicle for the commission of a forest offence, namely, transport of sandalwood billets from the reserve forest Though the order of confiscation was passed as early as on 10th April, 1962, the petitioner herein filed C M P No 207 of 1965 before the District Magistrate (J), Tiruchirapalli, for the return of the car only on 3rd April, 1965, on the ground that he was the owner of the car, who had given it to one Krishnaswami Chetti under a hire-purchase agreement The order of the District Magistrate shows how Krishnaswami Chetti filed several infructuous petitions, which he took up to this Court on more than one occasion. The learned District Magistrate did not negative the claim of the petitioner on merits, but relying on the decision of Kailasam, J , in C M Ps Nos 2841 and 2842 of 1964 filed by Krishnasami Chetti that it is obligatory on the part of the Court to confiscate the property used in the commission of a forest offence, by virtue of section 43 of the Madras Forest Act as amended by Madras Act XXXVI of 1961, he observed that it was immaterial who was the real owner of the car and dismissed the petition.

The decision of Kailasam, J , that by virtue of section 43 of the Forest Act as amended it is obligatory to confiscate the vehicle used in committing a forest offence is not open to question in view of the decision of the Supreme Court in *Indo-China Steam Navigation Co.* v. *Jasjit Singh*[1] But the Supreme Court held in that decision that a foreign company whose vessel had been confiscated for contravention of section 52-A of the Sea Customs Act is not entitled to challenge the validity of section 52-A on the ground that though *mens rea* is not an essential element of the section, it is *ultra vires* of Articles 14, 19 and 31 (1) of the Constitution It was observed in that decision that certain rights guaranteed to the citizens of India under Article 19 being not available to foreigners, the pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would not be available to foreigners. The Judges of the Supreme Court however made it clear that they were not expressing any opinion on the validity of section 52-A of the Sea Customs Act under Article 19 (1) (*f*) of the Constitution and that if the said question were to arise for their decision in any case, they would have to consider whether the provisions of section 52-A are not justified by Article 19 (5).

1 A I R 1964 S C 1140

In *State of Madras* v *V G Row*[1], it has been held that in applying the test of reasonableness, the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all be taken into consideration. In *Collector of Customs* v *Sampathu Chetty*[2], it was held that the test for ascertaining the reasonableness postulated of the restrictions in clauses (2) to (6) of Article 19 should be applied to each individual Statute impugned and no abstrat standard, or general pattern of reasonableness can be laid down as applicable to all cases

The conclusion of Kailasam, J. that it cannot be said that it is not a reasonable restriction to require the owner to use his property in such a way as not to be used in the commission of any offence, if I may say so with respect, is too wide in its terms The offenders under the Forest Act could have robbed the motor vehicle and committed the forest offence, and under section 43 of the Forest Act as amended, the vehicle should be confiscated as it was used in a forest offence. It could not be reasonably urged that the owner of the vehicle should not have allowed the robbery and prevented the robbers from using it in committing the forest offence It is not clear from the Forest Act the object which is sought to be achieved by the confiscation of the vehicle But it may be inferred that such confiscation is deemed necessary to prevent forest offences In fact the amendment of the Forest Act made by Madras Act XXXVI of 1961 refers only to offences relating to sandalwood trees in the reserve forests. If the object of the Amending Act was only to preserve sandalwood trees in the reserve forests, it would be sufficient to confiscate vehicles used to commit forest offences with regard to sandalwood. It should be seen that 'forest offence' as defined in section 2 of the Madras Forest Act means an offence punishable under the Act or any rule made thereunder. Number of rules framed under the Forest Act have created trivial offences Thus page 104 of the Madras Forest Manual, Volume I, 1940 Edition, contains rules to regulate fishing other than the trout in the Palni Hills, Madura District, Rule 1 provides:

"Save as hereinafter provided in these rules, no person shall fish in the Kodaikanal Lake, the Kodaikanal water-works reservoir, the Bryant Park pond or in their effluents or in any of the effluents lying within the boundaries specified in the schedule annexed to these rules "

Thus, if a person sits in a car on the bank of the Kodaikanal lake and catches two fishes without licence and carries them in his car, the car would be liable to be confiscated Though section 52-A of the Sea Customs Act provides for confiscation of a ship containing device for concealing goods, there is a provision in section 183 of the same Act that whenever confiscation is authorised by the Act, the Officer adjudicating it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit Thus in the case of a trivial violation, the owner of a ship could pay a small fine and get back the ship In *Mehtab Singh & Sons* v *State of Madhya Pradesh*[3], clause (*d*) of section 11 of the Opium Act as amended in the State of Madhya Pradesh, though hit directly by Article 19 (1) (*f*) of the Constitution inasmuch as it leaves no option in the matter of confiscation of any conveyance not necessarily of an accused but also belonging to an innocent person, was held to be saved by clause (5) of Article 19, as it imposed reasonable restriction on a person's fundamental right to property in the interests of the general public But under section 12 of the Opium Act, whenever confiscation is authorised by the Act, the Officer ordering it may give the owner of the thing liable to be confiscated an option to pay, in lieu of confiscation, such fine as the officer thinks fit There is no such corresponding provision in the Forest Act

Till the amendment of section 43 of the Forest Act and the decision of the Supreme Court referred to above, it has been the view of this Court that the owner

1 (1952) S C R 597 (1952) S C J 253 (1952) 2 M L J 135
2 (1962) 1 S C J 68 (1962) M L J (Crl) 1: (1962) 1 M L J (S C) 43 (1962) 1 An W R (S C) 43 (1962) 3 S C R 786 · A I R 1962 S C 316
3 A I R 1965 M P 36.

of the vehicle could get a return of the same if he proves that it was used without his connivance or knowledge (Vide *Kesavalu Naidu*, In re)[1]. In fact, Anantanarayanan, J, has on a prior petition filed by Krishnaswami Chettiar for the return of the same car in this case, held that it could not have been the intention of the Legislature that even unwary owners of vehicles, whose vehicles have been used for the commission of such offences without their knowledge, should be penalised by orders of confiscation of such vehicles, merely because the vehicles have been used as instruments in the commission of offences under the law (Forest Act), by other unscrupulous persons. It is true Kailasam, J explained away these observations by stating that the learned Judge was not dealing with section 43 of the Madras Forest Act and that his attention was not drawn to the amended section which makes it obligatory on the Court to confiscate the property, which is used in the commission of the offence.

In this connection two other circumstances have to be considered Section 55 of the Forest Act provides that:

> "Any Forest Officer specially empowered in this behalf may accept from any person reasonably suspected of having committed any forest offence other than an offence under section 50 or section 52 a sum of money by way of compensation for the offence which may have been committed, and where any property has been seized as liable to confiscation, may release the same on payment of the value thereof as estimated by such officer"

This shows that an accused who commits an offence under the Forest Act can compound the offence and avoid confiscation of his vehicle It could not have been the intention of the Legislature that an innocent owner of a vehicle, which is wrongfully used by an unscrupulous offender under the Forest Act, should be in a worse position than such an accused Section 55 clearly indicates that it is not necessary to confiscate in all cases the vehicles used for the commission of forest offences. Another circumstance to be noted is the provision contained in section 47 of the Forest Act giving a right of appeal to any person claiming to be interested in property seized under section 41 against an order of confiscation passed under sections 43 to 45 of the Forest Act I fail to see what objection the owner of a vehicle can put forward to the confiscation of his vehicle which has been used without his knowledge or connivance in the commission of forest offence, having regard to the absolute character of the provision contained in section 43 of the Act. It is true that the owner can plead that the vehicle was not used for committing the forest offence. But obviously such a plea would be totally inconsistent with the conviction of the accused of the forest offence which entailed the confiscation of the vehicle.

Having regard to the above circumstances, I entertain doubts about the correctness of the decision of Kailasam, J., in Crl M.P. No. 2290 of 1964. Hence the question referred to at the commencement of this order should, in my opinion, be considered by a Bench of this Court. I therefore direct the papers to be placed before my Lord the Chief Justice for suitable orders

In pursuance of the above Order of reference the petition came on for hearing before a Bench (*K. Srinivasan* and *R. Sadasivam, JJ*)

Fyzee Mohamed, Advocate for Petitioner in Crl M P. No 3266 of 1965.

The Advocate-General for the Special Public Prosecutor on behalf of the State.

The Order of the Court was made by

Sadasivam, J—The question of law referred to this Bench is whether section 43 of the Madras Forest Act as amended by the Madras Act XXXVI of 1961 offends the right to property guaranteed, under Articles 19 (1) (*f*) and 31 (1) of the Constitution of India.

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1. (1955) M W N (Crl.) 121

Section 43 of the Forest Act originally stood as follows.

"When any person is convicted of a forest offence, all timber or forest produce in respect of which such offence has been committed, and all tools, ropes, chains, boats, vehicles and cattle used in committing such offence, shall be liable, by order of the convicting Magistrate, to confiscation. Such confiscation may be in addition to any other punishment prescribed for such offence."

But the section was amended by Madras Act XXXVI of 1961 by substituting the words "shall be confiscated to the Government" for the words "shall be liable, by order of the convicting Magistrate, to confiscation".

Till the amendment of section 43 of the Forest Act and the decision of the Supreme Court in *Indo-China Steam Navigation Co* v *Jasjit Singh*[1], it has been the view of this Court that the owner of the vehicle used in the commission of an offence under the Forest Act, or Opium Act, or other similar Acts, could get a return of the same, if he proves that it was used without his connivance or knowledge. In fact, Anantanarayanan, J., as he then was, has, on a prior petition for the return of the car MDT. No 3625 filed by one Krishnaswami Chetti, who had purchased the car under a hire-purchase agreement, held that it could not have been the intention of the Legislature that even unwary owners of vehicles, whose vehicles have been used for the commission of such offences without their knowledge, should be penalised by orders of confiscation of such vehicles merely because the vehicles have been used as instruments in commission of offences under the law (Forest) Act by other unscrupulous persons. But when the matter again came up in revision at the instance of the said Krishnaswami Chetty after his petition was dismissed on merits by the Courts below, Kailasam, J., declined to interfere in revision.

The reference in this case has been made by one of us in a revision petition filed by Mam & Co, who gave the car to Krishnaswami Chetti on a hire-purchase agreement, against the order of the District Magistrate declining to go into the question on merits on the ground that it is obligatory on the Court to confiscate the property used in the commission of the offence. The order of reference has been made as some relevant considerations did not appear to have been brought to the notice of Kailasam, J, and the observation of Kailasam, J, that it cannot be said that it is not a reasonable restriction to require the owner to use his property in such a way as not to be used in the commission of any offence appeared to be too wide in its terms. In the order of reference it is stated by way of illustration that if the offenders under the Forest Act had stolen the motor vehicle and committed the forest offence and if under section 43 of the Forest Act as amended it was obligatory that the vehicle should be confiscated as it was used in a forest offence the owner of the vehicle could have no remedy even though it could not be reasonably urged that the owner of the vehicle should not have allowed the theft and prevented the thieves from using it in committing the forest offence. It may be reasonable to infer that the object of such confiscation is to prevent forest offences and this could be achieved without confiscating the vehicles of innocent persons. Several of the rules framed under the Forest Act have created trivial offences. Thus page 104 of the Madras Forest Manual, Volume I, 1940 Edition, contains rules to regulate fishing other than trout in the Palni Hills, Madura District. Rule 1 provides:

"Save as hereinafter provided in these rules, no person shall fish in the Kodaikanal lake, the Kodaikanal water-works reservoir, the Byrant Park Pond or in their effluents or in any of the effluents lying within the boundaries specified in the Schedule annexed to these rules."

Thus if a person sits in a car on the bank of the Kodaikanal lake and catches a fish or two without licence and carries the same in his car, the car would be liable to be confiscated. There is no provision in the Forest Act, unlike in section 183 of the Sea Customs Act and section 12 of the Opium Act to enable an owner to pay such fine as the concerned officer may think fit to impose in lieu of the confiscation of his vehicle. It is also significant to note that an accused who commits an offence under the Forest Act can compound the offence and avoid confiscation of his vehicle and it could not have been the intention of the Legislature that an innocent owner of a vehicle, which is wrongfully used by an unscrupulous offender

1 A.I.R. 1964 S.C. 1140.

under the Forest Act, should be in a worse position than such an accused Further, section 47 of the Forest Act gives a right of appeal to any person claiming to be interested in the property seized under section 41 of the same Act against an order of confiscation passed under sections 43 to 45 of the same Act We fail to see what objections the owner of a vehicle can put forward by way of appeal to the confiscation of his vehicle which has been used without his knowledge or connivance in the commission of forest offence if it is obligatory on the Court in all cases to confiscate the vehicle used in a forest offence

Subsequent to this reference, the Supreme Court has delivered judgment in Criminal Appeal No 97 of 1964 on its file in dealing an identical question which arose in the following circumstances under the Opium Act The relevant words of section 11 of the Opium Act of 1878 are as follows :

" *Section* 11—*Confiscation of Opium* —In any case in which an offence under section 9 has been committed the vessels, packages and coverings in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyance used in carrying it shall likewise be liable to confiscation "

The above provision was amended by the Opium (Madhya Bharat Amendment) Act, 1955 (Act XV of 1955) in the following words

" *Section* 11 In any case in which an offence under sections 9, 9-A, 9-B, 9-C, 9-D, 9-E, 9-F and 9-G has been committed, the property detailed hereinbelow shall be confiscated

.. .

(*b*) the receptacles, in which such opium may be concealed, and the animals, carts, vessels, rafts and conveyances used in carrying it "

It was contended on behalf of the State that the different phraseology deliberately employed by the Amending Act clearly disclosed the intention of the Legislature of making it obligatory on the Court to confiscate the vehicle used for the transport of opium. But the Supreme Court held that the High Court was correct in reading section 11 of the Madhya Bharat Act as permissive and not obligatory The Supreme Court referred to three relevant considerations in the following terms :

" It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory , it depends upon the context in which the word 'shall' occurs and the other circumstances Three considerations are relevant in construing section 11 First it is not denied by Mr Shroff (the learned Advocate for the State) that it would be unjust to confiscate the truck of a person if he has no knowledge whatsoever that the truck was being used for transporting opium Suppose a person steals a truck and then uses it for transporting contraband opium According to Mr Shroff, the truck would have to be confiscated It is well recognised that if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence (Vide *Tirath Singh* v *Bachittar Singh*)[1]

Secondly it is a penal statute and it should, if possible, be construed in such a way that a person who has not committed or abetted any offence should not be visited with a penalty

Thirdly if the meaning suggested by Mr Shroff is given, section 11 (*d*) of the Madhya Bharat Act may have to be struck down as imposing unreasonable restrictions under Article 19 of the Constitution Bearing all these considerations in mind, we consider that section 11 of the Madhya Bharat Act is not obligatory and it is for the Court to consider in each case whether the vehicle in which the contraband opium is found or is being transported should be confiscated or not, having regard to all the circumstances of the case "

Applying the principles of the above decision to the question referred to us, we have no hesitation in coming to the conclusion that the word 'shall' introduced by the Amending Madras Act XXXVI of 1961 does not make it obligatory on the Court to confiscate the vehicle used in a forest offence in each and every case irrespective of the innocence of the owner of the vehicle We have already referred to the relevant consideration in support of the said view If really Madras Act XXXVI of 1961 made it obligatory to confiscate the vehicle used in the commission of a forest offence under any circumstances so as to affect the rights of innocent owners of the vehicles, the amending Act may have to be struck down as imposing unreasonable restrictions under Article 19 of the Constitution. Thus, having regard to

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1. (1955) 2 M L J (S.C) 292 · (1955) 2 S.C.R 457 at 464 (1955) S C J 797

the relevant considerations we are of opinion that the amendment of section 43 of the Madras Forest Act by Madras Act XXXVI of 1961 by the substitution of the words "shall be liable, by order of the convicting Magistrate, to confiscation" does not make it obligatory to confiscate the vehicles used in forest offences in all cases and that it is for the Court to consider in each case whether the vehicle used in the commission of the forest offence should be confiscated or not having regard to all the circumstances of the case.

The reference is answered accordingly.

Crl. M. P. No. 3265 *of* 1965.—The decision in Crl.M P. No. 2024 of 1965 will govern this case also.

R.M. ——— *Answered accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE K.S. RAMAMURTI.

S. M. Abdul Jameel .. *Plaintiff**

v.

Messrs. Simson and Machonochy Ltd. and others .. *Defendants.*

Madras Buildings (Lease and Rent Control Amendment) Act (XI of 1964), *section* 3—*Construction.*

Landlord and tenant—Termination of main lease—Sub-lessee's right to continue in possession—Main lessee's liability for such continued possession by sub-lessee—Tenant from month to month—Rights —Contractual tenancy coming to an end by efflux of time—Continued possession by tenant and acceptance of rent by landlord thereafter—New contractual tenancy if can be inferred.

Section 3 of the Madras Amendment Act XI of 1964 being a provision dealing with the deprivation or curtailment of the vested rights already accrued should naturally receive a strict construction with the necessary presumption that Parliament does not intend to interfere retrospectively with existing rights except to the limited extent clearly manifested in the Act. Such Statutes should not be construed to have a greater retrospective operation than its clear language renders it necessary. If there is any doubt about the meaning of the language employed the rights already acquired would continue to be enforceable.

In the case of a tenancy, if the main lease terminates or a decree or order for eviction is passed against the main tenant, the landlord will be entitled to obtain possession of the property leased, the sub-tenants having no independent rights The determination of the main lease may arise in any manner known to law, either by the lessee himself consenting to the termination of the lease, or rendering himself liable to eviction under the provisions of an Act or by efflux of time and if rights flowing therefrom are sought to be enforced by the landlord, the sub-tenants cannot successfully resist such proceedings Decisions have even gone to the extent that a sub-tenant need not even be a party to the proceeding for eviction against the main tenant

If the main tenancy is determined and if the landlord gives the sub-tenant notice of this termination as well as the notice terminating the sub-tenancy, the fact that the sub-tenant remains in possession claiming to be a statutory tenant will not render the main tenant liable for rent or damages for use and occupation as the main tenant must be held to have done everything legally possible to give the landlord vacant possession

A tenant from month to month has two rights (*a*) to terminate the lease by fifteen days' notice and (*b*) to surrender at the end of any month even without any prior notice The tenant's right is not restricted to a right to terminate the lease by fifteen days' notice Both the rights are available.

If a contractual tenancy comes to an end by efflux of time and if the tenant continues in possession and the landlord accepts the rent after such expiration that will not afford ground for holding that the landlord has assented to a new contractual tenancy. (Vide *Ganga Dutt* v *Kartika Chandra Das*, A I R 1961 S C 1067)

Suit by the plaintiff seeking to recover possession of the portion of the premises in the occupation of defendants 2 and 3, and also claiming damages for use and occupation as well as some damages for restoration of electric installations and repairs to the ground floor etc.

A Srirangachariar and *P Shafir Ahmed* for Plaintiff.

King of Partridge and *A. R. Krishnaswami* for Defendants.

The Court delivered the following

JUDGMENT —The only point that survives for decision is whether the second defendant is entitled to rely upon section 3 of Madras Act XI of 1964, amendment

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*C S No. 116 of 1964. 25th April, 1966.

to the Madras Buildings (Lease and Rent Control) Act of 1960. The brief facts of the case may be stated.

The suit property known as 'Badshaw Buildings' situated in Errabalu Chetty Street and Sembudoss Street was leased out by the plaintiff to the first defendant for a period of ten years commencing from 1st January, 1954, under the registered deed of lease, Exhibit P-1 on a monthly rent of Rs. 1,750 for the entire premises. This lease deed under clause 6 (3) empowered the lessee to assign, let or sub-let all or any portion of the demised premises as the lessee may deem fit during the currency of the lease. In pursuance of that power, the first defendant had sub-let two separate portions of the premises to 2nd and 3rd defendants. The period of termination of the lease is 31st December, 1963, but during that last year of the lease the first defendant made some attempts with the plaintiff to obtain a renewal of the lease but without success as the plaintiff would not agree to a renewal of the lease and insisted upon having possession of the premises after the expiry of the ten year period. In view of this insistence of the plaintiff to obtain possession on the termination of the lease, the first defendant had duly informed defendants 2 and 3, the sub-lessees, that on the expiry of the lease by 31st December, 1963 they must vacate and hand over possession. While matters stood thus, the plaintiff wrote to the first defendant that the lease would stand terminated and determined by 31st December, 1963, that vacant possession of the premises should be handed over to the Plaintiff on or before 1st January, 1964, and that in default the plaintiff would be entitled to damages for use and occupation of the building at the rate of Re. 1 per square foot per mensem. Thereupon the first defendant wrote to the plaintiff, Exhibit P-6 dated 2nd December, 1963 informing the plaintiff that the first defendant had recently purchased a building in Sydenhams Road, Periamet, that some repairs had to be carried out in that building, and that within a period of four months they would effect the repairs and shift to the new building after handing over possession of the suit premises to the plaintiff. In that letter the first defendant wanted the lease to continue till 1st April, 1964 for a period of three months on the same terms as to rent as in the lease deed Exhibit P-1. The plaintiff did not agree to this suggestion and insisted upon having possession of the premises on 1st January, 1964 and in default damages for use and occupation at the rate of Re. 1 per square foot per mensem. Under their reply, Exhibit P-8, dated 27th December, 1965 the first defendant reiterated the same attitude, insisting upon an extension of the lease till the first defendant was in a position to shift to its new building. It is unnecessary to refer to the further correspondence between the parties, and it is sufficient to mention that under Exhibit P-9, the letter sent by the plaintiff to the Counsel for the first defendant on 2nd January, 1964 the plaintiff still adhered to his decision. The first defendant ultimately vacated that portion of the premises in its occupation on 30th April, 1964 and handed over the keys thereof to the plaintiff. As defendants 2 and 3 however refused to vacate, the plaintiff was told that he may take symbolical possession of the portion in the occupation of defendants 2 and 3, and that necessary letters of attornment would be obtained from them Exhibit P-15, the letter written by the first defendant to the plaintiff on 30th April, 1964, shows that on that day, the first defendant sent a cheque for Rs. 1,750 being the rent for the month of April, 1964, and also sent the keys of the locks in respect of the portion which was in the occupation of the first defendant. On the same day the plaintiff sent the letter, Exhibit P-16, protesting at the failure of the first defendant to hand over possession of the property in the possession of defendants 2 and 3 For these 4 months, January to April, 1964, it is the case of the first defendant, that the sum of Rs. 1,750 per month was sent to the plaintiff and received by the plaintiff towards rent while the case of the plaintiff is that the said sum of Rs. 1,750 per month was received by the plaintiff not as rent but only as compensation for use and occupation of the building from 1st January, 1964 without prejudice to other rights and claims of the plaintiff.

The plaintiff filed the present action on 31st July, 1964 seeking to recover possession of the portion in occupation of defendants 2 and 3, and also claiming damages for use and occupation as well as some damages for restoration of electric

installations and repairs to the ground floor. In respect of the portion which was in the occupation of the first defendant and which was handed over to the plaintiff by the end of April 1964, the plaintiff claimed Rs. 5,000 per month as damages for use and occupation and after deducting the sum of Rs. 7,000 paid by the first defendant at the rate of Rs. 1,750 per month under this head for the period of four months the plaintiff claimed a sum of Rs. 13,000 from the first defendant. For the portions in the occupation of defendants 2 and 3 the plaintiff claimed damages for wrongful continuance, a sum of Rs. 14,000 at the rate of Rs. 2,000 per month from January, 1964 till the date of suit. The third defendant had handed over possession of the portion in its occupation and the plaintiff is therefore not seeking any relief as against the third defendant The second defendant took out an application, Application No. 3214 of 1965, seeking permission to file a supplemental written statement containing the plea that as a result of the passing of the Madras Amending Act XI of 1964, the plaintiff was not entitled to any relief as against the second defendant on the ground that the first defendant was not liable to be evicted under the Madras Act XI of 1964 aforesaid, and that the second defendant was entitled to resist the claim of the plaintiff in the right of the first defendant.

* * * * * * *

[After stating that the plaintiff gave up all his claims as against the 1st defendant and pointing out that the suit therefore survived only as against the second defendant with regard to the relief of recovery of possession of the property in its possession and with regard to the relief of damages and compensation for use and occupation and for wrongful possession His Lordship proceeded:]

Before I proceed further it is necessary to refer to the amending Act, Madras Act II of 1964 (which received the assent of the President on 5th June, 1964) in particular, sections 2 and 3 of the Act.

The Madras Rent Control Act (XXV of 1949) did not fix any ceiling limit and the Act applied to all the buildings as defined under the Act, irrespective of the rent for which they were let out. But under the Rent Control Act of 1960, (Madras Act XVIII of 1960) a ceiling limit was fixed under section 30. Section 30 exempted the application of the provisions of the Act to residential buildings, the rental value of which exceeded Rs 250 per month, and non-residential buildings, the rental value of which exceeded Rs. 400 per month as entered in the property assessment books of the municipality. This provision was amended by Madras Act II of 1962 to provide that this exemption would apply to either a building or a part thereof and instead of the rental value as entered in the Property Tax Register the actual rent paid by the tenant was taken as the basis for the ceiling limit of Rs. 250 (for residential buildings) or Rs. 400 for the non-residential buildings. Under Madras Act XI of 1964 the exempting provision relating to non-residential buildings was deleted with the result that so far as non-residential buildings were concerned, the tenant was given protection under the Act irrespective of the rent that he may be paying either for the building or a portion thereof. Sections 2 and 3 of Madras Act XI of 1964 are in these terms:

"*Section* 2 *Amendment of section* 30, *Madras Act XVIII of* 1960 —In section 30 of the Madras Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as the principal Act)—

(i) in clause (ii) the word 'or' occurring at the end shall be omitted ;

(ii) clause (iii) shall be omitted ;

(iii) in the Explanation, for the words, brackets and figures 'clauses (ii) and (iii)' the words, brackets and figures 'clause (ii)" shall be substituted.

Section 3 . *Certain pending proceedings to abate* —Every proceeding in respect of any non-residential building or part thereof pending before any Court or other authority or officer on the date of the publication of this Act in the *Fort St George Gazette* and instituted on the ground that such building or part was exempt from the provisions of the principal Act by virtue of clause (iii) of section 30 of the principal Act, shall abate in so far as the proceeding relates to such building or part All rights and privileges which may have accrued before such date to any landlord in respect of any non-residential building or part thereof by virtue of clause (iii) of section 30 of the principal Act shall cease and determine and shall not be enforceable .

Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date mentioned in this section "

The point that arises for decision relates to the proper interpretation of section 3, the saving clause.

(1) All proceedings which have been initiated on the ground that the non-residential building or a part thereof was exempt from the provisions of the Act are to abate and cannot be prosecuted any further.

(2) All rights and privileges which may have accrued to the landlord in respect of the non-residential building by virtue of the old provision in section 30 (3) shall cease and shall not be enforceable. These rights, for example, may include, right to institute suits for eviction, right to sue for damages for use and occupation or mesne profits for wrongful possession and the right to execute decrees for eviction already obtained but not executed.

(3) If any decree or order already passed has been executed or satisfied in full before the Act came into force the same shall not be invalidated, nor can it be re-opened. The question that arises for decision is whether the saving clause, section 3, affords any protection to the sub-tenant the second defendant This provision, being one for the deprivation or curtailment of the vested rights already accrued (before 5th June, 1964) should naturally receive a strict construction with the necessary presumption that Parliament does not intend to interfere retrospectively with existing rights, except to the limited extent clearly manifested in the Act. Such Statutes should not be construed to have a greater retrospective operation than its clear language renders it necessary. If there is any doubt about the meaning of the language employed the rights already acquired would continue to be enforceable.

If the main lease terminates or if a decree or order for eviction is passed against the main tenant, the landlord will be entitled to obtain possession of the property leased, the sub-tenants having no independent rights. The determination of the main lease may arise in any manner known to law, either by lessee himself consenting to the termination of the lease, or rendering himself liable to eviction under the provisions of the Act or by efflux of time and if rights flowing therefrom are sought to be enforced by the landlord, the sub-tenants cannot successfully resist such proceedings. It may be that as between the sub-tenant and his lessor, that is the lessee, the sub-tenant may not be liable to be evicted under the provisions of the Act But this right of the sub-tenant to continue in possession as against his own lessor, the main lessee, can avail nothing in a proceeding by the lessor Decisions have even gone to the extent that a sub-tenant need not even be a party to the proceeding for eviction against the main tenant. Section 26 of the present Act provides that an order for the eviction of the tenant passed under the Act shall be binding on all sub-tenants who are made parties in the application for eviction. Vide *Ramachandra Sastri* v *Mohamed Hussain*[1] In a recent judgment of mine in C R.P. No 494 of 1964 this aspect of the matter has been considered in full detail and all the relevant decisions have been examined In my judgment I have followed and applied the principle of the Bench decisions of this Court in *Devaraja Bhatt* v. *V. S Raja*[2], and *Express Estates Ltd* v. *Modern Furnishing House*[3], as well as the latest decision of the Supreme Court in *Rupchand* v. *Raghu Vanchi*[4] In this connection it is important to notice that in the Bench decision *Express Estate Ltd.* v. *Modern Furnishing House*[3], Rajamannar, C J., delivering the judgment on behalf of the Bench had adverted to the significance of the amendment introduced in 1951 to the Madras Rent Control Act of 1949 by which an inclusive definition of a tenant was introduced to the effect that a tenant, who sub-lets shall be deemed to be landlord within the meaning in relation to the sub-tenant It was pointed out that this definition would not affect the rights of the original landlord and its object was only to give a limited protection against eviction as between the tenant and the sub-tenant.

This defeasible nature of the rights of the sub-tenant was also considered by a Bench of this Court in *Katha Perumal* v. *Muthiah*[5], in a case arising under the Madras

1. (1965) 2 M.L J 102
2. (1952) 2 M.L J 179.
3. (1953) 1 M.L J. 22 : A.I.R 1953 Mad. 414.
4. A.I R 1964 S C. 1889.
5. (1963) 1 M.L J. 359.

Cultivating Tenants Protection Act. Ramachandra Iyer, C.J., put the matter thus at page 362:

> "It is well settled that there is neither privity of estate, nor privity of contract between the head lessor and the sub-lessees and that therefore the sub-lessee will not be liable for rent nor on any covenants in respect of the lease granted by the head lessor to the chief tenant But ordinarily speaking the chief tenant stands in the same relationship to the sub-tenant as his own landlord stands towards him. For example, a sub-tenant will be estopped from denying the title of his landlord, namely, the chief tenant to grant the sub-tenancy, just in the same way as the chief tenant will be precluded from denying the title of the head lessor at the time of the grant of the lease The head lessor's rights will not be affected by the sub-lease Sub-tenants right will therefore stand or fall with the right of the main tenant. For example if the main lease comes to an end either by efflux of time or by forfeiture, then the sub-lessee will lose his right to possession as well But the case will perhaps be different where the head lessee voluntarily surrenders in favour of his landlord in derogation of the rights granted by him to the sub-lessee But so long as the main lease is subsisting the sub-tenant will have all rights secured to him under his contract with his own lessor as well as those rights which a statute might give him as against the lessor. For example, if a main tenant obtains a lease from the head lessor for a term of 10 years and he lets into possession of the land a cultivating tenant as sub-lessee for a period of one year, such sub-lessee would be a cultivating tenant within the meaning of the Act, and be entitled to all the privileges for the duration of his lessor's title. If such title terminates on the expiry of the term, the sub-lessee's right to remain in possession of the land notwithstanding the fact that it had been given to him under the statute, will have to automatically come to an end, as he cannot have a higher right than what his own lessor had ..
>
> To put it differently, such statutory rights of protection as a sub-tenant can have against his own lessor, will be determined and be limited by the duration of that lessor's right For example, if the main tenant's tenancy is for a term, the sub-tenant entitled to protection under the Act will, notwithstanding the expiry of his contract, be entitled to remain in possession for the duration of that term. But it can extend no further Where the main tenant is himself protected by the statute, his sub-tenant can, as against him obtain protection under the Act for the duration of the statutory right of the main tenant"

Reference may also be made to my decision in *Ramachandra Chetti* v. *Mothaliyandan Chettiar*[1] From the foregoing it will be clear that the statutory right of protection of the sub-tenant is limited by the duration of the right of his own lessor (that is the main lessee) and it can extend no further. The result therefore is that if the plaintiff has got a right to evict the first defendant and recover possession of the entire premises the second defendant will have no independent or superior right on the basis of the sub-lease in his favour.

My attention was drawn to some of the decisions in England and in India rendered under similar Rent Restriction Acts in which the relative rights of the landlord, the tenant and the sub-tenant came up for consideration. In some of them the landlord was held entitled to obtain possession from the sub-tenant while in some it was held that even though as between the landlord and the main lessee there was a determination of the lease by the surrender on the part of the main lessee, the landlord would not be entitled to evict the sub-tenant. It may not be necessary to examine those decisions in great detail as in all those cases the relevant statutes contained an important distinguishing provision that on the determination of the main lease the sub-tenant shall be deemed to have become a tenant of the lessor. A brief reference to the same shall be made later.

Learned Counsel for the second defendant did not seriously controvert this position that in the case of a statutory tenancy the rights of the sub-tenant would perish along with that of the main tenant, but he distinguished all the cases cited at the Bar as cases dealing with statutory tenancies simpliciter. His argument is that after the expiry of the lease on 31st December, 1963 there was a monthly tenancy created between the plaintiff and the first defendant and so long as that tenancy had not been validly determined by the issue of the requisite notice under section 106 of the Transfer of Property Act, the contractual tenancy between the plaintiff and the first defendant would continue. The plaintiff not having given a valid notice to determine and having no right to evict the first defendant during that situation and that during all that period when the plaintiff was labouring under the disability of having no right to secure possession from the first defendant, the second defendant who was in possession under a derivative title from the first defendant would be entitled to resist the plaintiff's claim for possession. In substance

1. (1965) 2 M.L.J. 265

his argument was that if during the currency of a contractual tenancy the main tenant created a sub-lease, the sub-lessee would be entitled to continue in possession for the duration of the period of the main lease, and his right would not be in any way affected by the conduct of the main lessee in either agreeing to an earlier determination of the lease or a surrender of the same. Developing this aspect, the learned Counsel contended that the monthly lease did not terminate in April, that before the plaintiff validly terminated the monthly contractual lease, the amending Act, Madras Act XI of 1964 had come into force and operated as a bar to the plaintiff seeking possession of the property from the first defendant thereafter, and that this bar against the plaintiff would operate not only for the benefit of the first defendant, but for the second defendant as well, since he was in possession under a derivative title from the former. On the facts learned Counsel urged that when the first defendant sent the rent of Rs. 1,750 every month from January to April, 1964, he sent it as rent for the respective months, and that even if the plaintiff had protested and claimed to receive the monthly payments not as rent but merely as damages for use and occupation with a reservation of his express rights, the acceptance of these payments, in law would however amount to the recognition of the status of the first defendant as a tenant from month to month under the principle of the decision in *Kaikhushroo* v. *Bai Jerbai*[1], following and applying the principle of the decision in *Croft* v. *Lumley*[2]. This argument cannot be accepted as it proceeds upon a wrong and incorrect appreciation of the true events and the real factual position The correspondence referred to earlier clearly shows that the extension of the lease desired by the first defendant was for a limited purpose and for a limited period. Vide the first defendant's letter to the plaintiff, Exhibit P-6, dated 2nd December, 1963 The first defendant has made it clear that they would continue in the premises only till they shift to the new premises in Sydenhams Road, Periamet, on or before 1st April, 1964, and for that purpose they desired the tenancy to be continued for a period of three months from 1st January, 1964. That it was a tenancy for a limited period is again reiterated in the letter sent on behalf of the first defendant, Exhibit P-8, dated 27th December, 1963. This contingent lease for a period of three months later on became by the turn of subsequent events a lease for four months as the first defendant could complete the repairs and shift only on 30th April, 1964. Whatever may be the protests of the plaintiff when he received monthly payments of Rs. 1,750 even applying the principle of the decision in *Kaikhushroo* v. *Bai Jerbai*[1], it would only mean that the plaintiff's protest will have to be ignored and the plaintiff will be bound by the terms on which the first defendant made the payment. In this case the condition is not a lease from month to month, but a lease for a particular period, namely, till the first defendant was in a position to vacate and shift to their own new premises. It must be noticed that it is only an accident that this shifting occurred on 30th April, 1964. It is just a coincidence perhaps due to the fact that the first defendant did not desire to shift in the middle of the month. But that does not affect the factual position that the extension of the lease insisted upon by the first defendant is only for a definite limited period upto the contingency of their shifting to the new premises

At this stage it is necessary to refer to Exhibit P-13, letter written by the first defendant to the plaintiff. Even though that letter was written during the currency of a month, 11th April, it is clear that as a result of that letter the tenancy gets crystallised to a period of four months till 30th April, 1964 and the first defendant did not desire to be a tenant any longer. That letter also shows that even in respect of the portion in the possession of the defendants 2 and 3 the first defendant never asserted any right as a tenant and he had even suggested that letters of attornment can be obtained from them (defendants 2 and 3) as direct tenants of the plaintiff I am clearly of the view that in such a situation there is no need for any valid notice passing between the plaintiff and the first defendant for determining the lease under section 106 of the Transfer of Property Act. At that time Act XI of 1964 had not come into force and it was purely a matter of arrangement between the plaintiff and

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1 1949 F L J 163 1949 F.C.R 262 A I.R 1949 F C 124.

2 10 Eng. Rep. 1459

the first defendant. The position will be made clear if for purposes of argument it is assumed that at that time there was no Rent Control Act, Madras Act XVIII of 1960. The contractual tenancy would have clearly come to an end by 30th April, 1964, under Exhibit P-13, and it would not be open to the second defendant to say that the lease had not been validly determined and therefore the second defendant would be entitled to continue in possession in the right of the first defendant. I am clear in my mind that looked at from any point of view the first defendant ceased to be a tenant after 30th April, 1964 Even if it were to be held that it was a lease from month to month, this letter, Exhibit P-13, is sufficient to put an end to the lease and has actually determined the lease, and the second defendant cannot thereafter claim any rights.

There is another important reason why it is impossible to accept this contention of the second defendant, that there was a contractual tenancy between the plaintiff and the first defendant after 31st December, 1963 The first defendant himself never claimed any such right and on the other hand he claimed only the rights of a statutory tenant under Madras Act XI of 1964, in his written statement and in the arguments submitted on his behalf. The contention of the second defendant too was the same and in fact they filed a supplemental written statement claiming rights as a statutory tenant under Act XI of 1964. This point was presented only now in the course of the arguments when the second defendant was confronted with insuperable difficulty as revealed by judicial decisions of this Court and of the Supreme Court regarding the rights of sub-tenant when the main tenancy comes to an end. It will be a perversion of facts to hold in this case that the first defendant was a contractual tenant. It is meaningless to inflict upon him a contractual tenancy in respect of the portion occupied by defendants 2 and 3 because so far as the portion in the occupation of the first defendant was concerned he vacated and handed over the keys. During that four months period it is very doubtful whether the first defendant will have right to sub-let because it is impossible on the facts of this case to hold that acceptance of the payments of Rs. 1,750 every month would also include the recognition of a right to sub-let. One thing which is perfectly clear and beyond any shadow of doubt is that the first defendant never intended to claim nor claimed any right in respect of any portion of the premises after 30th April, 1964. The first defendant simply pleaded his inability and his legal difficulties to get possession from the second and third defendants as the first defendant wrongly thought that they would be entitled to make some claim to remain in possession because the second and third defendants were not paying rent exceeding Rs 250 per month. It has been held that if the main tenancy is determined and if the landlord gives the sub-tenant notice of this termination as well as the notice terminating the sub-tenancy the fact that the sub-tenant remains in possession claiming to be a statutory tenant will not render the tenant liable for rent or damages for use and occupation as the main tenant must be held to have done everything legally possible to give the landlord vacant possession. Vide Woodfall on Landlord and Tenant, 26th Edition page 1042 It is sufficient to refer to the leading decision in *Reynolds* v. *Bannerman*[1] In that case the tenant gave his landlord due notice to quit and also a similar notice terminating the lease to the sub-tenant. The sub-tenant claiming protection under the Rent Restriction Act continued in occupation and refused to quit. The main tenant duly gave up possession to the landlord of his portion of the premises but was unable to give vacant possession of the portion in the occupation of the sub-tenant, and it was held that if the tenant had done all he could do to give vacant possession the tenant was not liable to the landlord for damages for use and occupation My conclusion therefore is that factually there is no contractual tenancy between the parties, and the second defendant cannot be permitted to rely upon a contractual tenancy when not only did he not raise any such plea in the written statement but on the other hand claimed protection only as a statutory tenant in his own independent right as well as in the right of the first defendant In para. 6 of his written statement the first defendant has claimed protection only as a statutory tenant. In paras 5 and 10 the first defendant had clearly stated that his tenancy

1. L.R (1922) 1 K B. 719

extended only upto 30th April, 1964, and that from 1st January, 1964 to 30th April, 1964, the possession of the first defendant was as a statutory tenant. In the second defendant's written statement in paras. 5, 6, 12 and 13 the second defendant has stated that he is entitled to the benefits of statutory tenant under the Rent Control Act. In the face of this specific pleading it is futile for the second defendant to rely upon any contractual tenancy. In my opinion the instant case is governed by the principle of the Bench decision in *Express Estates Ltd* v. *Modern Furnishing House*[1], already referred to. The facts in that case were almost identical. In that case the properties were leased to Bosotto Brothers who sublet to the sub-lessee, the Modern Furnishing House. The Bench held that if Bosotto Brothers did not raise any objection to the decree for possession, the Modern Furnishing House who was merely a sub-tenant under Bosotto Brothers cannot resist delivery of possession. There a decree was passed in a suit for possession against Bosotto Brothers and the dispute arose in execution proceeding. In the present case in the very suit itself the first defendant in the course of the arguments conceded the right of the plaintiff to recover possession, provided the plaintiff gave up the claim for mesne profits as against the first defendant.

Reference must also be made to the oft-quoted decision in *Solomon* v. *Orwell*[2], in which the statutory tenant vacated that portion of the premises occupied by her by removing therefrom and by giving the keys to the landlord as in the instant case. But the sub-tenant refused to vacate from the portion in his occupation. It was held that a statutory tenant had no interest capable of existing in law as an estate after the main tenant had vacated the premises, and that the sub-tenant's rights of occupation automatically came to an end and that the landlord was entitled to possession of the entire property.

Even if it is a contractual tenancy from month to month the possession of the second defendant is no better. As a tenant from month to month the first defendant has two rights (*a*) to terminate the lease by fifteen days' notice; (*b*) to surrender at the end of any month even without any prior notice. The tenant's right is not restricted to a right to terminate the lease by fifteen days' notice. Both the rights are available. After 31st December, 1963, when the second defendant continued under the first defendant he can continue only subject to the termination of the lease from month to month in one or two ways mentioned earlier. He continues and could continue in possession only subject to that risk or contingency of the first defendant putting an end to the lease by surrendering at the end of any month. This was what has actually happened in the instant case. The derivative right which the second defendant claims to have acquired from the first defendant based upon contractual tenancy from month to month is defeasible and would automatically come to an end when that monthly tenancy is terminated.

There is the further fact which I have already adverted to, that the plaintiff has elected to regard the first defendant as having performed his obligation to deliver the property to the lesser. If the plaintiff accepts that, by delivery or surrender the lease comes to an end, and immediately the plaintiff gets a present right to possession of the property and whoever is in possession will be a trespasser as against the plaintiff. It is quite competent to the plaintiff to give acquittance to the 1st defendant with regard to his obligation and pursue the second defendant for recovery of possession. This election can be made at any time either before the suit or in the course of the suit. Looked at from any point of view, I am clearly of the view that the second defendant cannot resist the plaintiff's claim for possession.

Learned Counsel for the second defendant placed considerable reliance upon the decision of the Supreme Court in *Anand Nivas (P.) Ltd* v. *Anandji*[3]. In my opinion this decision, far from supporting the second defendant, is against him. In the majority judgment delivered by Shah, J., it has been held that the rights of a sub-tenant would come to an end when the main tenant vacated the premises or when the main lease comes to an end. The decision in *Solomon* v. *Orwell*[2], was

1 (1953) 1 M L J 22 A I R 1953 Mad 414
2 (1954) 1 All E R 874
3 A.I R 1965 S C 414

referred to with approval and followed. From the majority judgment it is clear that a statutory tenant has no right to sub-let and that a statutory tenant who continues in possession on the determination of his contractual tenancy is permitted to remain in occupation so long as he observes and performs the conditions of the tenancy and pays rent, and that his personal right of occupation does not carry with it a right to transfer or assign or sub-let the property. The main point that was stressed and argued in that case on which there was a difference of opinion between the majority and the minority (Sarkar, J.) as he then was, was whether a statutory tenant has a right to sub-let. Sarkar, J., as he then was, took the view that a statutory tenant has a right to sub-let while the majority view was to the contrary. This case turned upon the peculiar provisions of the Bombay Rent Control Act of 1947 and the Bombay Rent Control and Lodging House Ordinance of 1959 which contained the particular provision that if any portion of the rented premises has been lawfully sub-let the sub-lessee shall be deemed to have become the tenant of the landlord on the same terms and conditions if the interest of the main tenant is determined for any reason. This provision is absent in the Madras Act and the instant case is therefore governed by the well established rule that the termination of the main lease automatically puts an end to the rights of the sub-tenant Repeated stress was laid by learned Counsel for the second defendant on the fact that in the main lease deed, Exhibit P-1, clause 6 contains a special provision authorising subletting. In my opinion this does not help the second defendant in any manner.

It is necessary to refer to the decision of the Supreme Court in *Ganga Dutt* v. *Kartika Chanda Das*[1]. In that case it was held that if a contractual tenancy came to an end by efflux of time and if the tenant continues in possession and the landlord accepts the rent after such expiration that will not afford ground for holding that the landlord has assented to a new contractual tenancy. The matter was put thus at page 1070:

"The High Court was in our judgment right in holding that by merely accepting rent from the appellant and by failing to take action against him, the appellant did not acquire the rights of a tenant holding over It is true that in the notice dated 10th October, 1950, the appellant is described as a monthly tenant, but that is not indicative of conduct justifying an inference that a fresh contractual tenancy had come into existence Within the meaning of the West Bengal Premises Rent Control Act, 1950, the appellant was a tenant and by calling the appellant a tenant the respondents did not evince an intention to treat him as a contractual tenant The use of the adjective 'monthly' also was not indicative of a contractual relation. The tenancy of the appellant was determined by efflux of time and subsequent occupation by him was not in pursuance of any contract express or implied but was by virtue of the protection given by the successive statutes This occupation did not confer any rights upon the appellant and was not required to be determined by a notice prescribed by section 106 of the Transfer of Property Act"

This decision is against the second defendant and a complete answer to his contention based upon a contractual tenancy from January, 1964.

In my view there is no conceivable manner in which the second defendant can seek the aid of the provisions of Madras Act IX of 1964. After the first defendant surrendered the portion in his possession and disclaimed all interest in the portion in the possession of the second and third defendants and never asserted any rights thereto, nor claimed a tenancy therefor, the right of the plaintiff as against the second defendant and the third defendant to recover possession of the properties in their possession is not based upon section 30 (3) of Madras Act of 1960 The right of the plaintiff is the result of the first defendant accepting the termination and surrendering possession of the rest of the premises. No right had accrued to the plaintiff in respect of the portion in the possession of defendants 2 and 3 under section 30 which alone is saved under Madras Act XI of 1964. In other words section 30 of Madras Act XVIII of 1960 would have operated only between the plaintiff and the first defendant

My attention was also drawn to the decision in *Cow* v. *Casey*[2], which arose under the English Rent Restriction Act. In that case too the main tenant agreed to determination of the lease and went out of the house but the sub-tenant refused to vacate.

1. A I R. 1961 S C 1067. 2 (1949) 1 K B 474.

It was held that after the termination of the main lease the sub-tenant became a trespasser, as in that case the Act too did not apply to the building in question. In our case too the Rent Control Act of 1960 did not apply to non-residential building as the rent was more than Rs. 400 per month. Lord Greene, M.R., observed that if any right of the sub-tenant were to be recognised after the main tenancy had come to an end it would result in the anomalous position that the main tenant while vacating from his portion would be entitled to leave the landlord saddled and foisted with a statutory sub-tenant. For all these reasons I hold that the plaintiff is entitled to a decree for possession against the second defendant in respect of the portion in its occupation. There is no need to pass any decree as against the first defendant, as the first defendant claims no rights over this portion of the property.

* * * * * *

[The rest of the judgment except the following portion has been omitted as being not material for the purpose of this report.]

The result is the plaintiff will be entitled to a decree for possession of the property in the occupation of the second defendant and a decree for mesne profits at the rate of Rs. 1,000 per month from the second defendant from 1st May, 1964 till delivery of possession.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

R. Gopalakrishna Pillai .. *Appellant**

v.

P. S. Venkatesam Pillai .. *Respondent.*

Specific Relief Act (I of 1877), section 9—Decree for possession under, in favour of defendant—Suit by plaintiff in possession without surrendering possession, for declaration of title and for injunction restraining defendant from executing his decree—Maintainability

Where a decree for possession had been obtained by the defendant under section 9 of the Specific Relief Act, a suit by the plaintiff in possession without surrendering such possession in pursuance of the decree in favour of the defendant, for a declaration of his title and for injunction for restraining the defendant from executing his decree would be maintainable Section 9 of the Specific Relief Act by itself imposes no specific bar to a suit by the defeated party in possession before surrendering possession There is nothing in the language of the section to take away the remedies available to a person in possession of property as of right and entitled to remain in possession

Appeal against the Decree of the Court of the Subordinate Judge of Caddalore in Appeal Suit No 106 of 1961, preferred against the Decree of the Court of the District Munsif of Vridhachalam in Original Suit No. 436 of 1959.

J R Gundappa Rao, for Appellant.

R. Desikan, for Respondent.

The Court delivered the following

JUDGMENT.—The dispute in this case relates to a strip of land about 7 links width north to south and 136 links east to west which the plaintiff claims to have purchased from the sons of one Dharmalingam Pillai under Exhibit A-1 dated 15th January, 1955 The defendant claims title to the suit property under an oral sale decades ago by Dharmalingam Pillai to his deceased agnatic cousin Venugopala Pillai and the allotment of the site to him in partition Immediately south of the disputed site, the defendant claimed another extent of about 16 links in width and this site abutted the public street. It has now been found finally in S A. No. 650 of 1962 that this vacant site abutting the street belongs to the Government, and is poromboke It may be stated that the defendant claimed title to the suit site as well as to the site immediately south under the same title and by adverse possession. The suit out of which the Second Appeal arises was preceded by the suit, O S. No. 391 of 1955 on the file of

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*S A No 1841 of 1962 15th September, 1966.

the District Munsif, Chidambaram, by the defendant under section 9 of the Specific Relief Act alleging trespass by the plaintiff subsequent to proceedings for eviction taken by the Government on the poromboke site. The defendant lost that suit in the first Court and succeeded in revision in this Court in C.R.P. No 247 of 1957. The plaintiff thereupon instituted the present suit for declaration of his title to the suit property and for an injunction against the defendant executing the decree he had obtained in the suit filed under section 9 of the Specific Relief Act. In the alternative there was a claim for possession. There were various defences to the suit on the merits and on the maintainability of the suit. The Courts below have, on ample and relevant evidence, found that the plaintiff had title to the strip of land in question. They have also found plaintiff's possession of the land within 12 years prior to the suit The case of the defendant of oral purchase of the property by his brother was found against. These findings against the plaintiff's right to the suit property on the basis of title and adverse possession are findings of fact in this case and not open to reconsideration in Second Appeal.

But learned Counsel for the appellant attacks the decree of the Court below contending that the present suit is not maintainable, as the plaintiff had not surrendered possession of the property pursuant to the decree in the suit instituted by the defendant under section 9 of the Specific Relief Act made on revision in this Court, before instituting his suit on the basis of title In support of this position, learned Counsel relied upon a decision of the Allahabad High Court in *Parma Nand* v. *Smt. Chimmawati*[1]. It is seen from the facts of that case that there was a decree for possession in a prior suit under section 9 of the Specific Relief Act and before surrendering possession a suit was filed for an injunction restraining the decree-holder in the suit under section 9 from executing his decree for possession. While confirming the dismissal of the suit by the Courts below, the learned Judge Brij Mohan Lall, J., observed :

"In my opinion also such a suit does not lie. The appellants must first surrender possession and thereafter they can set up any right they like on the basis of title If they are granted an injunction restraining the respondent from executing her decree the very object and purpose of the suit under section 9, Specific Relief Act, will be defeated "

The vice of the latter suit in that case appears to be that it claimed only an injunction restraining the execution of the decree, and from the facts as set out in the report it appears that it was the only relief claimed in the latter suit. Section 9 of the Specific Relief Act by itself imposes no specific bar to a suit by the defeated party in possession before surrendering possession Section 9 of the old Act ran thus :

"If a person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof "

There is nothing in the language of the section to take away the remedies available to a person in possession of property as of right, and entitled to remain in possession. Of course it goes without saying that when there is a valid decree for possession against a plaintiff, he will not be granted an injunction from executing that decree. If the legality of the decree is not questioned, a decree-holder cannot be restrained from executing the decree as between the parties to the decree. In the Allahabad case as I see it the relief being only for injunction the suit had necessarily to be dismissed. Section 9 provides only a summary and speedy remedy to a person dispossessed. The title to the possession is outside the scope of the suit. When a suit on title questioning the order in the summary suit is filed, in one sense the decree or order for possession is impugned, and in manner provided by law as no appeal is competent. The object of the title suit is in substance to have the summary order for possession set aside on the basis of title and right to present possession. In such a suit if the plaintiff in possession has claimed declaration of his title, in my view it may properly be follow-

1. A.I.R. 1955 All 64.

ed by the consequential relief of injunction : see *Mari* v. *Santaya*[1]. Section 56 of the Specific Relief Act, 1877 will be no ban.

In the present case the plaintiff has not only asked for declaration of his title but he has also prayed in the alternative for possession. As it happened in this case, in the interlocutory proceedings for injunction the matter went up in appeal and the appellate Court refused interim relief of injunction. It is noticed by the learned District Judge that the present plaintiff was willing to permit the defendant to take possession of the suit property. Only he wanted a condition imposed that the compound wall which was erected by him during his possession pending the suit under section 9 of the Specific Relief Act should not be demolished by the defendant. In the circumstances of the present case the apprehension noticed in the Allahabad case assuming it applies has no application. Without a claim for injunction the present suit could be maintained. The plaintiff has allowed the defendant to take possession, and has claimed with declaration, possession as consequential relief As pointed out by a Division Bench of this Court (Leach, C.J. and Byers, J.) in *Narasaya* v. *Subbayya*[2], a person without title in possession of property is only a trespasser. The learned Judges observed :

"The appellants were in possession as trespassers and the fact that they succeeded in the suit under section 9 of the Specific Relief Act did not make their trespass any the less They remain trespassers in spite of their decree "

This being the true legal position, I do not find any legal flaw in the frame of the suit that would vitiate the action.

The Second Appeal fails and it is dismissed. No costs. No leave.

V.K. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

The Kasturbanagar Co-operative House Construction Society, Ltd., Madras-20, by its Secretary .. *Petitioner**

v.

K. Soundararajan and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 25-FF and 33-C (a)—Applicability—Co-operative Society, the employer—Dismissed workman, employee of the parent society allotted to the employer—Liability of society for retrenchment benefits—Jurisdiction of Labour Court—If ousted by Madras Co-operative Societies Act, (VI of 1932) section 51—Effect of Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 (XXXVI of 1956), section 31.

The Special Officer divided the Madras Co-operative House Construction Society (the parent society) into 8 new societies with effect from 10th August, 1962, one of which is the petitioner society The proceedings of the Special Officer provided that the existing staff of the parent society stood allotted to the new societies on the then existing terms and conditions of services, privileges as to pay in the same scale, allowance, leave, etc ,—no express provision being made for retrenchment compensation. The first respondent's services which began in 1948 in the parent society was placed with the petitioner society His services were terminated by the petitioner on 8th March, 1963, on the ground that its resources were slender.

The Labour Court on a claim by the first respondent, in a petition under section 33-C (2) of the Industrial Disputes Act (XIV of 1947), allowed notice pay, retrenchment compensation and leave pay. The petitioner, therefore, has filed this writ petition to quash the said order of the Labour Court on the following grounds (i) the petitioner is not a transferee society liable to pay retrenchment compensation, (ii) the questions in dispute between the parties would fall under section 51 of the Madras Co-operative Societies Act (VI of 1932), (iii) in view of that section read with section 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 the Labour Court had no jurisdiction to pass the order

Held : Privileges 'in respect of pay, allowance, leave, etc ,' would include all the privileges to which the workman would be entitled , the contention to the contrary cannot be accepted

The scope of section 51 of the Madras Act (VI of 1932) is limited, it relates only to a dispute touching the business of a registered society Retrenchment compensation claim is a dispute between the

1. A I R. 1922 Bom 216 266 at 268.
2 I L R (1943) Mad. 122 : (1942) 2 M.L J.
*W.P. No. 252 of 1965 24th November, 1966.

society and the servant but it is not a dispute touching the business of the society, nor are all the benefits to the worker under the Industrial Disputes Act comprehended by section 51 and the section is not therefore attracted

The Madras Co-operative Societies Act is not *in pari materia* with the Industrial Disputes Act as aforesaid and section 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, section 31 would not be attracted so as to exclude the applicability of the provisions of the Industrial Disputes Act, 1947 to the dispute herein between the parties—retrenchment compensation on the basis of the first respondent's service from 1948.

Admittedly salary in lieu of notice is to be disallowed

Petition under Article 226 of the Constitution of India praying the High Court to issue a writ of *certiorari* calling for the records relating to Claim Petition No. 246 of 1964 and quash the order therein.

V Syamalam for *V. S. Ramakrishnan*, for Petitioner.

D. Raja, for Respondent.

The Court made the following

ORDER.—This petition is filed by the Kasturbanagar Co-operative House Construction Society, Ltd., for the issue of writ of *certiorari* quashing the order of the Labour Court, Madras, in Claim Petition No. 246 of 1964.

The first respondent filed a Claim Petition before the Labour Court under section 33-C (2) of the Industrial Disputes Act, for computation of the benefits of the notice pay, retrenchment compensation, gratuity and leave salary The first respondent was employed as a peon in the Madras Co-operative House Construction Society from 13th December, 1948. This Society was divided into eight societies from 10th August, 1962, by virtue of the provisions of section 13 of the Madras Co-operative Societies Act VI of 1932 The assets and liabilities of the parent society were divided among the eight societies. The services of the first respondent were placed at the disposal of the Kasturbanagar Co-operative Society which was one of the eight societies. The first respondent was drawing a salary of Rs 85 till 8th March, 1963 when he was dismissed from service, on the ground that the resources of the society were slender. On representation made by the first respondent to the Registrar of Co-operative Societies, he directed the petitioner Society to pay retrenchment compensation according to the scale prescribed in the Industrial Disputes Act. The petitioner Society failed to comply with the direction. Thereupon, after issuing a notice to the Society the first respondent as mentioned earlier preferred a claim petition before the Labour Court under section 33-C (2) of the Industrial Disputes Act. The petitioner-Society opposed the claim petition on several grounds It was contended that the first respondent was transferred to the petitioner-Society by the Special Officer without the concurrence of the Society and therefore the transfer was illegal and did not confer any benefit on the transferee (first respondent) under section 25-FF of the Industrial Disputes Act. It was also contended that if there was any dispute it could only be proceeded with under section 51 of the Madras Co-operative Societies Act, 1932, and not under the Industrial Disputes Act. But the Labour Court overruled these objections and allowed the first respondent's claim in regard to notice pay, retrenchment compensation and leave salary. The Kasturbanagar Co-operative House Construction Society, Ltd , has filed this writ petition to quash the order of the Labour Court.

It is first contended that the petitioner is not a transferee Society liable to pay retrenchment compensation on the entire service of the first respondent from 1948. Under Exhibit P-3 dated 14th August, 1962, the Special Officer directed that, consequent on the division of the Madras Co-operative House Construction Society, Ltd., into eight new societies with effect from 10th August, 1962, the existing staff ofthe former parent society stood allotted to the new societies on the then existing terms and condtions of service. The first respondent was allotted as a peon to the petitioncr-Society. The proceedings of the Special Officer also provided that the members of the staff would continue to be paid the same pay in the time scale of pay, as they were then getting and they would be entitled to the same privileges

in the matter of pay, allowance, leave, etc., as they were eligible while serving the former Madras Co-operative House Construction Society. It is contended that while the same privileges in the matter of pay, allowance, leave. etc. were secured, there was no provision regarding retrenchment compensation. This contention cannot bear scrutiny, as what is secured is the same privilege in respect of pay, allowances, leave, etc which would include all the privileges to which a workman would be entitled. This contention has to be rejected.

It is next contended that the dispute, if any, would fall under section 51 of the Madras Co-operative Societies Act, 1932, and can, therefore, be dealt with only by the Registrar of Co-operative Societies. Section 51 of the Act provides :

> " If any dispute touching the business of registered society (other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society) (*a*) .. . (*b*) (*c*) between the Society and its committee, any past committee, any officer, agent or servant, or any past officer, past agent, or past servant, or the nominee, heirs or legal representatives of any deceased officer, deceased agent, or deceased servant, of the society or (*d*) . such dispute shall be referred to the Registrar for decision "

Under this section, the Registrar may decide the dispute himself, or transfer it for disposal to any person who has been invested by the State Government with powers in that behalf, or refer it for disposal to an arbitrator. My attention has also been drawn to section 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act (XXXVI of 1956) which provides :

> "If immediately before the commencement of this Act, there is in force in any State any Provincial Act, or State Act relating to the settlement or adjudication of disputes, the operation of such an Act in that State, in relation to matters covered by that Act shall not be affected by the Industrial Disputes Act, 1947, as amended by this Act "

Reading the two sections quoted above, it is contended that, as the Madras Act has provided for arbitration and settlement of disputes, the Labour Court will not have jurisdiction to adjudicate the dispute. This contention cannot be accepted, for, the scope of section 51 of the Co-operative Societies Act is limited. It relates only to any dispute touching the business of a registered society and arising between the society and its servant. There is no doubt that the claim for retrenchment compensation will be a dispute between the society and its servant. But it is not a dispute touching the business of the registered Society. All disputes between the society and its servants cannot be said to be disputes touching the business of a registered society. In *Messrs. Co-operative Milk Societies Union* v. *West Bengal State*[1], it was held that a dispute between a co-operative society and its workmen did not relate to the actual business of a Co-operative society and therefore did not touch the business of the Co-operative Society. For coming to this conclusion, the learned Judge of the Calcutta High Court relied on the definition of the word 'dispute' in the Bengal Co-operative Societies Act. But the word 'dispute' is not defined in the Madras Co-operative Societies Act, 1932 Learned Counsel for the petitioner placed strong reliance on the exclusion of a dispute regarding disciplinary action taken by the Society against its paid servant and submitted that this exclusion would suggest that any other dispute between the society and its paid servant would be covered by section 51 of the Act. This argument though plausible on the wording of the section, cannot be accepted ; for, in my view, industrial disputes such as retrenchment compensation, gratuity, etc., are not contemplated within the provisions of the Co-operative Societies Act The industrial legislation confers various benefits on a worker, and the worker is entitled to retrenchment compensation, gratuity, etc., which otherwise he would not be entitled to under the Co-operative Societies Act, or any other Act. The dispute contemplated by section 51 of the Madras Co-operative Societies Act, 1932 would not comprehend all the benefits to the worker under the Industrial Disputes Act for deciding which a special machinery is set up.

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1. A.I.R. 1958 Cal. 373.

Learned Counsel for the petitioner-Society placed reliance on a decision of a Division Bench of this Court in *South Arcot Co-operative Motor Transport Society, Ltd.* v. *Syed Batcha*[1] The Bench was concerned with a dispute relating to service conditions as between the Society and its members. It was held that the dispute regarding service conditions would be a matter touching the business of the Society to be adjudicated upon under section 51 of the Madras Co-operative Societies Act. In coming to the conclusion, it was held that the respondents were not workmen and they were share-holders of the society and that any claim in regard to their service conditions would be a matter touching the business of the Co-operative Society. The decision therefore rested on the fact that the respondents were share-holders of the Society and as such were not workmen. But in the present case, the first respondent is a peon, and cannot be excluded from the word ' workman ' as defined in the Industrial Disputes Act. Learned Counsel for the petitioner strongly relied on the observation of the Bench which is as follows:

"It is also very doubtful whether the Industrial Disputes Act itself will apply when there is the Madras Co-operative Societies Act (VI of 1932—State Act) which provides a machinery for the settlement or adjudication of disputes, because section 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act (XXXVI of 1956), says. . "

This observation is merely an expression of opinion and is in the nature of *obiter dictum*. As stated already, I am of the view that the disputes relating to retrenchment compensation, gratuity, etc., do not fall within the purview of section 51 of the Madras Co-operative Societies Act. In this connection, reference may also be made to section 25-F of the Industrial Disputes Act, which provides that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until the workman has been given one month's notice in writing indicating the reasons for retrenchment. The workman is also entitled to retrenchment compensation which shall be equivalent to 15 days' average pay for every completed year of service. Section 25-J of the Industrial Disputes Act provides that the provisions of Chapter V-A of the Act which relates to lay-off and retrenchment shall have effect notwithstanding anything inconsistent therewith contained in any other law. Considering section 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 and section 25-J of the Industrial Disputes Act, 1947, the Supreme Court in the *Santram Ramprasad Mills Co., Ltd.* v. *Baliram Ukandaji*[2] observed:

" . even if sections 31 and 25-J save the application of the C P and Berar Act they do so subject to the condition that question of lay-off must be decided in accordance with Chapter V-A and section 33-C clearly provides that a dispute for any money due under Chapter V-A has to go before the appropriate Government or its delegate "

The effect of the decision as applied to the present case would be that the provisions of section 31 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 and section 51 of the Madras Co-operative Societies Act, 1932, cannot exclude the operation of the provisions of the Industrial Disputes Act, 1947 in the matter relating to retrenchment compensation, gratuity, etc., of a workman of a Co-operative Society.

It is admitted that, so far as salary in lieu of notice is concerned, the first respondent is not entitled to it. The order of the Labour Court in so far as it directs payment of Rs 85 in lieu of a month's notice is set aside. In other respects, the order of the Labour Court is confirmed. The writ petition is dismissed. There will be no order as to costs.

K G S. *Petition dismissed.*

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1 A I R 1964 Mad 103 at 618.
2. (1966) 1 S C J 724 : A I R. 1966 S.C. 616

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Ratan Chand Chordia .. *Petitioner**

v.

The Special Assistant Commercial Tax Officer (Collection), Salem .. *Respondent.*

Constitution of India (1950), *Article* 226—*Hire-purchase—True nature of transaction—Determination of—If within the scope of a writ proceeding*

Whether the property in the possession of the hirer belongs to him or the original owner thereof or financier cannot be determined in all cases by a perusal of the agreement of hire purchase Surrounding circumstances have also to be taken into consideration and sometimes the Court may have to go behind the documents, unless prohibited by law, to ascertain its true nature

Such an analysis in order to ascertain the true nature of the transaction cannot be done in a writ proceeding where there is not much scope for calling for evidence at great length.

In such a case the petitioner has to be directed to seek his remedy in independent civil proceedings.

Petition to issue a writ of *certiorari* calling for the records relating to the proceedings of the Special Assistant Commercial Tax Officer (Collection), Salem, in No. R. 47-48-49/63-64.

P. V. Subramanyam, for Petitioner.

The Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner in this writ petition for the issue of a writ of *certiorari* under Article 226 of the Constitution is a financier. He claims to have lent money to one Mallayan Chettiar, Shevapet, Salem, for purchasing the lorry MDP. 1475 under two hire purchase agreements, the first one on 11th May, 1959 and the second one on 29th April, 1961. This Mallayan Chettiar was a sales tax assessee and for arrears of sales tax due from him, the respondent, the Special Assistant Commercial Tax Officer (Collection), Salem, attached the lorry in question and was proposing to bring it to revenue sale under the provisions of the Revenue Recovery Act. On the short ground that under the terms of the hire-purchase agreement, the vehicle in question belongs to the petitioner, the financier, and not the sales tax assessee Mallayan Chettiar, the petitioner has sought in this writ proceeding for a writ quashing the proceedings of the respondent attaching the lorry and directing it to be sold. The Department's contention in answer to this writ proceeding, was that the data now supplied by the petitioner, which consist of the formal hire-purchase agreements are not conclusive for determining whether the owner of the lorry is the petitioner or the sales tax assessee Mallayan Chettiar. The learned Government Pleader appearing for the Department referred to the decision of the Supreme Court reported in *Sundaram Finance, Ltd* v. *State of Kerala*[1], where the Supreme Court has visualised two types of hire-purchases One is where the terms as well as the surrounding circumstances might indicate that the financier was the owner of the vehicle but had let out the vehicle to the hirer on a hire agreement giving the option to the hirer to purchase the vehicle from the financier on fulfilling the terms and conditions of the hire. There can also be another type of hire purchase agreement where the vehicle really belongs to the hirer who had borrowed money from the financier and as security for the money he has borrowed, he has executed what is termed a hire-purchase agreement, but what is in substance only a security for the loan transaction. The Supreme Court has also observed that the real nature of the transaction in such cases cannot be determined in all cases from a perusal of the agreement. The surrounding circumstances will also have to be taken into consideration and the Court, in a proper case, can go behind the documents, unless prohibited by statute, and determine the nature of the transaction, whatever may be the form of the documents. It appears that this analysis which is required, before

*W.P No 894 of 1964. 12th January, 1967.

1. (1966) 17 S.T.C. 489: A I R. 1966 S.C 1178.

the true nature of the transaction may be ascertained, cannot be done in a writ proceeding, where there is not much scope for calling for evidence at any great length The proper order in such case will be to direct the petitioner to seek his remedy in independent civil proceedings In fact, it is represented that over the same lorry a repairer who had spent a large sum of money for its repair has claimed a lien, and had obtained an order for its attachment pending the disposal of the suit for recovering the repairer's dues Whatever may be the nature of that suit, it appears reasonable to grant some time to the petitioner also to file a suit, and get appropriate directions from the civil Court before the lorry is sold away for realising the sales tax arrears. Therefore, while dismissing the writ petition, I also give a direction that the Department shall defer selling the attached lorry for a period of three months from today, to await the orders of the civil Court in a suit that might be filed by the petitioner for appropriate reliefs There will be no order as to costs.

K.G.S. — *Petition dismissed.*
Directions to defer sale for 3 months given.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE A ALAGIRISWAMI.

Mac Laboratories (Private) Ltd .. *Appellant**

v.

V R Nathan, Sole Proprietor of V R. Nathan & Sons .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 39—*Grant of temporary injunction under—Principles applicable to issue of permanent injunction under Specific Relief Act—Applies*

Specific Relief Act (*I of* 1877), *section* 57—*Permanent injunction to enforce negative covenants in service contracts—Grant of—Scope*

While the issue of a temporary injunction is governed by the provisions of Order 39 of the Code of Civil Procedure still the principles applicable to the issue of a permanent injunction under the Specific Relief Act would normally govern the consideration of the question whether a temporary injunction should issue

It has been laid down that the preventive relief by way of injunction whether perpetual or temporary is within the discretion of the Court depending on the particular circumstances of each case and that in order to entitle the plaintiffs to a temporary injunction pending the disposal of the suit, the plaintiffs must make out a *prima facie* strong case in support of the right they claim and further show that irreparable damage will result to them if the injunction is not granted

Under section 57 of the Specific Relief Act of 1877, notwithstanding section 56 (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided that the applicant has not failed to perform the contract so far as it is binding on him The argument that where in a contract of service the covenant is wholly positive and not negative an injunction cannot be issued, is untenable Whatever may be the position in England as far as India is concerned the Courts have been prepared to proceed on the basis that a positive agreement that a certain person would serve another exclusively would imply a negative agreement not to serve any other person during the period of the agreement with the first person which could specifically be enforced under section 57 of the Specific Relief Act In this matter the servant has the same rights as the master so that a master who has agreed to employ a servant could be prevented by an injunction from employing any other person as his servant.

Appeal against the Order of the City Civil Court (Vth Assistant Judge), Madras, dated 10th October, 1966, and made in I.A. No. 9305 of 1966 in O.S. No. 3102 of 1966.

V K. Tiruvenkatachari, for *S. Sampath Kumar* and *G. Venkateswara Rao*, for Appellant.

K. Rajah Iyer, for *K. Sarvabhauman* and *T. R. Mani*, for Respondent.

The Court made the following

ORDER.—This is an appeal against an order of interim injunction passed by the Vth Assistant Judge, City Civil Court, Madras, in I A. No. 9305 of 1966 in O S. No. 3102 of 1966. The appellants are defendants in the suit. They are manufac-

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* A.A.O. No. 300 of 1966. 16th December, 1966.

turers of pharmaceutical products and also sole agents in India for foreign manufacturers of pharmaceutical products The plaintiff and defendants entered into an agreement in May, 1955 which was to last for a period of 12 years from 1st April, 1955, with an option to renew for a like period at the end of the term The expenses of the plaintiff's organisation were to be met by the defendants But it was not to exceed 15 per cent of the gross sales The plaintiff was to be entitled to a half-share in the profits made It is not necessary to enter into great details as to the terms of the contract between the parties The defendants proposed to take over the distribution with effect from 1st September, 1966 into their own hands and announced their decision by their letter dated 23rd August, 1966, purporting to terminate and revoke all their existing contracts with the plaintiff The plaintiff filed the suit alleging that the defendant had no power to terminate the sole distribution rights granted to the plaintiff, and that the plaintiff continued to be the sole distributor of the defendants and their foreign principals, and that they had also option to renew the tenure for a further period of 12 years Therefore, the plaintiff laid the suit to restrain the defendants from committing a breach of the sole distribution agreement between the parties and prayed for the issue of a permanent injunction restraining the defendants from in any manner distributing, selling or otherwise dealing with their products or the products of their foreign principals Pending disposal of the suit, the plaintiff filed I A. No. 9305 of 1966 for an interim injunction. The learned Assistant City Civil Judge issued an interim injunction prayed for, holding that at this stage the Court's only duty is to see whether there is a *bona fide* contention between the parties and on which side in the event of success the balance of convenience will lie if the injunction does not issue, that if the Court finds that there is a substantial question to be investigated and that matters should be preserved in *status quo* till the final disposal of the question, it is sufficient ground for granting injunction, and that it is neither proper nor is the Court bound to go into the question and decide whether the application is not maintainable in law and injunction prayed for cannot be granted under the Specific Relief Act. In other words, the view of the learned Assistant City Civil Judge was that the matter had to be decided not under the Specific Relief Act, but should be decided under the provisions of Order 39, Civil Procedure Code, because it is concerned with interim injunction. He held that the ends of justice and the balance of convenience required that a temporary injunction should issue restraining the defendants from distributing, selling or otherwise dealing with their products or the products of their foreign principals and issued an order accordingly.

Mr Rajah Iyer appearing for the respondent made it clear that the question is now concerned with the period upto 31st March, 1967. The terms of the contract as regards an option for renewal are not quite clear as to whether the option lay with the plaintiff or with the defendants and whether the renewal was to be on the same terms as at present or terms were to be negotiated and arrived at by an agreement between the parties. Even otherwise it would have to be held that the matter of renewal of the agreement not being very clear, the question would have to be decided only on the basis of the rights of the parties under the present agreement which is to enure till 31st March, 1967 It should also be made clear that the terms of the agreement and the relationship between the parties are such that the matter does not lend itself to a decree for specific performance Therefore the further question that arises is whether under the circumstances a permanent injunction could issue and also whether a temporary injunction could issue in the circumstances of this case.

The principles governing the matter have been very extensively canvassed by both the parties While the issue of a temporary injunction is governed by the provisions of Order, 39, Civil Procedure Code, still the principles applicable to the issue of a permanent injunction under the Specific Relief Act would normally govern the consideration of the question whether a temporary injunction should issue. In *Subba Naidu* v *Haji Badsha Sahib*[1], a Bench of this Court held that the principles

1. (1903) 13 M L J. 13 . I L R. 26 Mad. 168.

which govern the grant of temporary injunctions under the Civil Procedure Code are the same as those which are laid down in the Specific Relief Act relating to the grant of a perpetual injunction, and that the grant of such an injunction is a matter of judicial discretion Though it is put in the form of query, that is the view which their Lordships were disposed to take. In *D D. G Hansa of Bremen* v. *Pestonji*[1], it is observed as follows (at page 348) :

" The question of a temporary injunction is dealt with by the Civil Procedure Code, whereas the question of a permanent injunction is dealt with under the Specific Relief Act But the principles applicable to the two proceedings are very similar They both derive from the Court of the Chancery and they postulate that a man will be punished if he does what his conscience tells him not to do It is, therefore, impossible in disposing of temporary injunction to exclude from ones mind the English doctrine as contemplated in the Specific Relief Act "

It has been laid down that the preventive relief by way of injunction, whether perpetual or temporary, is within the discretion of the Court depending on the particular circumstances of each case, and that in order to entitle the plaintiff to a temporary injunction pending the disposal of the suit, the plaintiffs must make out a *prima facie* strong case in support of the right they claim and further show that irreparable damage will result to them if the injunction is not granted The principles applicable to circumstances like these are not in doubt But in practice considerable difficulties are felt in applying the principles to any particular set of facts

In Halsbury's Laws of England, Volume 21, Simonds Edition at page 343, the law is laid down as follows :—

" The object of an interlocutory or interim injunction is to preserve matters in *status quo* until the case be tried and will only impose such restraint as may suffice to stop the mischief complained of, or, where the object is to stay further injury, to keep things as they are at the moment Such an injunction is in effect a substitute for the damages which might be assessed for the period between the issuing of the writ and the trial "

At page 352 it is observed as follows :—

" It is the very first principle of injunction law that *prima facie*, the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy Where the Court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds , first, that the injury is *irreparable* (italics mine) and second, that it is continuous *By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages*, not injury which cannot possibly be repaired , and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages "

In respect of interlocutory injunction it is laid down at page 364 .

" in no case does the Court grant an interlocutory injunction as of course it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved in *status quo* until that question can be finally disposed of "

In this case there is no doubt that the contract is to extend upto 31st March, 1967. But the question whether the defendants have the right to terminate the contract, is still a disputed question and the learned Assistant City Civil Judge has given no consideration to that aspect of the case. I must also say that this is not a case where an irreparable injury in the sense of an injury which could never be remedied or atoned for by damages would accrue to the plaintiff In a case of breach of contract the normal remedy would be damages. It is not as though that in this case if the plaintiff is not allowed to distribute the products which are sold by the defendants, it would not be possible to calculate what exactly the damages would be It would be quite possible to calculate the damages In *D. D G Hansa of Bremen* v. *Pestonji*[1] Bilaram, A J.C , has quoted the following passage .

" The inconvenience to the defendants not to say the society at large, would be greater if the Court interfered than not interfering could possibly be to the plaintiffs, because all that plaintiffs require is money, and if they are entitled to money they will be entitled to recover it in the ordinary course of law As to reputation I do not see why it should suffer by differing from a particular railway company , the reputation of the railway company may equally suffer by differing from the plaintiff If the plaintiff's reputation does, however, suffer, there is a remedy open at law "

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1 A I R 1925 Sind. 347 and 349.

That passage would apply to the circumstances of the present case also.

The next question is whether an injunction could be issued under the principles laid down in the Specific Relief Act. Under section 57 of the Act notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided that the applicant has not failed to perform the contract so far as it is binding on him Under section 56 (*f*) an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced Under section 21 a contract which runs into such minute or numerous details or which is not dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms, cannot be specifically enforced The terms of the present contract are such that it is not a contract which can be specifically enforced and therefore under section 56 (*f*) an injunction cannot be granted to prevent the breach of the contract. All the same the question is whether under section 57 an injunction could be granted. On behalf of the appellants it has been argued that an injunction cannot be granted and that in this case there is no negative agreement which could be directed to be performed by an injunction It is conceded that a covenant wholly negative could be enforced by means of an injunction, but it is urged that where the covenant is positive not negative, an injunction cannot be issued The appellants quoted extensively from Modern Equity by Harold Greville Hanbury, 8th Edition. At page 570 it is stated :—

" The principle that has guided the Courts has been that they will not enforce specific performance by a back door

It is easier for the Court to restrain the breach of a separate negative covenant which accompanies an affirmative covenant in the same contract than it is for it to infer the presence of a negative covenant from the presence of an affirmative covenant standing by itself "

In any case, it is urged, as there is no specific negative covenant an injunction cannot be issued in this case In this case while there is an affirmative covenant there is no negative covenant. It has only to be inferred. The present case is really a contract of service, a contract between principal and agent. At page 571 of the book it is observed :

"But it is in relation to contracts of service that the difficulties surrounding the problem become really acute, and the Courts have been driven back on the significance of a negative stipulation "

At page 573 it is laid down :

" In later cases Judges have tended to adopt, as a rough-and-ready solution of the difficulties, a distinction between cases in which the contract contains both affirmative and negative stipulations, and cases in which it contains stipulation purely affirmative By granting " negative performance " in the former, and refusing it in the latter type of case, they have taken the middle path between jettisoning the great authority of Lord St Leonards on the one hand and committing themselves to a dangerously wide policy on the other "

It is argued by the appellants that as the contract in the present case contains only stipulations purely affirmative, it should not be protected by means of an injunction. But that is not the view which the Courts in this country have been disposed to take. In *Burn & Co* v *Macdonald*[1], a Bench of the Calcutta High Court held that although there was no negative condition in terms in the agreement, a negative covenant could be properly implied under section 57 of the Specific Relief Act. Their Lordships observed at page 364 :

" The law in India on this subject is codified and it has been laid down in the House of Lords by the Judicial Committee and in several cases in this Court that where the law has been codified it is of little avail to enquire what is the law apart from such codification, but we must look to the Code itself as our guide in the matter The law here is codified by section 57 of the Specific

1 (1909) I L R 36 Cal 354.

Relief Act That seems to me to make the case reasonably clear . The language of that section is reasonably clear, and it appears to give legislative sanction in India to the view expressed by Lord Selborne in the passage I have read . . . The view I entertain coincides with that of the late Chief Justice Farran in the case of *Charlesworth* v *Mac Donald*[1] In that case the Court thought that there was a negative covenant, although the terms of the agreement were not very clear After dealing with the case of *Lumley* v *Wagner*[2], Farran, C J says ' In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases It would virtually debar them from engaging an assistant at all An action for damages would afford them no protection, certainly no adequate protection ! and, in a previous part of his judgment he refers to section 57 of the Specific Relief Act and speaks of it ' as a legislative decision to the same effect' Now, can we in the present case properly say that a negative covenant is implied ?

I feel no doubt about it Here the covenant is that the defendant will diligently and to the best of his ability devote himself to the duties as a draftsman and general assistant Surely when a man says that he will devote himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm It would be dangerous to hold the contrary "

The view expressed by Lord Selborne about *Lumley* v *Wagner*[2], in *Wolverhampton & Walsall Railway Co* v *London & North-Western Railway Company*,[3] referred to by the Bench of the Calcutta High Court is as follows (at page 363) ·

" With regard to the case of *Lumley* v *Wagner*[2] to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground and to extend to it an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word ' not ' in an agreement ' I will not do a thing ' as well as the words ' I will ' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative will act on the expression of it I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy If it is, I cannot think that ought to depend on the use of the negative rather than an affirmative form of expression If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative "

In *Galliangi Harjivan* v *Narsi Tricum*[4], it is observed as follows ·—

" At present all that we are concerned with is the covenant on the part of the defendant that he would serve plaintiff *exclusively* for the period of ten years from 1st February, 1893 That is a lawful *agreement* Specific Relief Act (I of 1877), section 57, *Illustration* (*d*) shows that if *B* contracts with *A* that he will serve him faithfully for twelve months as a clerk, *A* is entitled to an injunction restraining *B* from serving a rival house as clerk So here defendant contracted with plaintiff to serve him as cutter for ten years from 1st February, 1893 , why should plaintiff not obtain an injunction restraining defendant from serving a rival milliner as cutter during that period ?

It may be doubted whether in England the plaintiff would succeed Thus to take the case of *Whitwood Chemical Co* v *Hardman*[5] . Lindley, L J admitted that every agreement to do a particular thing in one sense involves a negative He said (pp 426-427)

' It involves the negative of doing that which is inconsistent with the thing you are to do but it does not at all follow that because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it The Court has never gone that length, and I do not suppose that it ever will We are dealing here with a contract of a particular class It is a contract involving the performance of personal service, and, as a rule, the Court does not decree specific performance of such contracts That is a general rule There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley* v *Wagner*[2] that is to say, where a person has engaged not to serve any other master . the Court can lay hold of that and restrain him from so doing . . and the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this or the other—some specific thing on which you can put your finger ' . .

But in India we must follow the words of the statute No doubt under section 56, clause (*f*) of the Specific Relief Act an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced , and under section 21 (*b*) and (*g*) a contract of personal service cannot be specifically enforced, nor can a contract the performance of which involves the performance of a continuous duty, extending over a longer period than three years from its date But section 57 specifically provides for this difficulty . . . . .

1 I L R (1899) 23 Bom 103 at 113
2 (1852) 5 De & G & S 485.
3 (1873) L R 16 Eq 433, 440.
4 (1894) I L R 18 Bom 702 at p. 708
5 L R (1891) 2 Ch 416

The circumstance that the Court is unable to directly compel specific performance of the affirmative agreement by defendant that he shall serve me as cutter for ten years from 1st February, 1893, does not preclude it from indirectly compelling specific performance of that agreement by granting an injunction to defendant to perform the implied negative agreement that he will not during that period serve anybody else as cutter "

In *Madras Railway Co.* v. *Thomas Rust*[1], where the defendant signed an agreement in England with a railway company whereby he contracted to serve the company exclusively for four years it was held that the plaintiff company was entitled to an interlocutory injunction restraining the defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ In fact in *Subba Naidu* v *Haji Badsha Sahib*[2], an argument was advanced that section 57 should be confined to *Lumley* v. *Wagner*[3], type of cases. This Court observed at page 171 :

"There is certainly nothing in the words of section 57 to suggest that so narrow a construction should be placed upon it The section is really a proviso to section 56, which cuts down the operation of the preceding section Mr Grant has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward though no dought there are expressions of opinion in the text books which support his proposition The authorities such as there are, are against the proposition which he invites us to adopt "

This Court referred to the decision in *Madras Railway Co* v *Rust*[1], It may be noted that that case was not even a case of personal service It is therefore clear that as far as this country is concerned, the Courts have been prepared to proceed on the basis that a positive agreement that a certain person would serve another exclusively would imply a negative agreement not to serve any other person during the period of the agreement with the first person It may also be pointed out that in *Jairam Valjee* v *Indian Iron and Steel Co*[4], it was held that in respect of the contract where a company used the words "total," "all" and "entire," the company undertook to purchase all the flux needed from the vendor at the rate specified and the purchase of the flux by the vendee from other suppliers amounted to a breach and that the vendor had made out a case for injunction It is therefore not possible to follow the opinion expressed by the learned author Harold Greville Hanbury in Modern Equity, 8th Edition, above referred to- It is clear that in so far as the present agreement is concerned, there is an implied negative agreement that the plaintiff should not either entrust the sole agency to anybody else or distribute the products themselves directly If this case were one of perpetual injunction, the Court would have power to grant the perpetual injunction

It is further argued for the appellants that this case being one of personal service more or less like that of master and servant, there have so far been no cases where a master who has agreed to employ a servant has been prevented by an injunction from employing any other, though there have been a number of cases where a servant who has agreed to serve a master exclusively has been prevented by an injunction from serving any other master A number of cases have been relied on, particularly in reference to sole selling agencies In *Brett* v *East India and London Shipping Co , Ltd*[5], it has been held that the Court will not compel specific performance of an agreement by a company to employ plaintiff as their broker, and that the contract being at an end, that which is merely an adjunct to the principal relief sought, namely, an injunction to restrain the company from advertising in breach of a stipulation contained in the agreement, the name of any other person as their broker, will not be granted In *Macdonald* v *Casein Ltd*,[6], it has been held that an injunction will not be granted restraining the breach by a principal of a contract giving an agent the sole agency for the sale of goods in a specified area, unless the contract contains an express negative covenant In *Cant* v *Miller*[7], English and Empire Digest (Replacement) Vol 823 *355) it was held that the contract between plaintiffs and defendant was not an assignment of the defendant's rights under his contract with the colliery company but an agreement for personal

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1 (1891) I L R 14 Mad 18
2 (1903) I L R 26 Mad 168 (1903) 13 M L J 13
3 (1852) 5 De & G & S. 485.
4. A I R 1940 Cal. 466.
5 10 L T 187
6 (1917) 2 W W R. 1132.
7. (1913) Australia 28.

service with an implied covenant not to employ any one else, and that therefore the injunction should not be granted, the proper remedy being for damages at law. In *Atlas Steels (Aus) Pty Ltd* v *Atlas Steels Ltd* [1], where defendant appointed plaintiff its sole distributor and sole agent for sale of its goods in a specified territory by an agreement containing an express negative stipulation by defendant whereby defendant bound itself not to sell any of its goods in the territory, it was held an injunction should not be granted to restrain breaches by defendant of the negative stipulation In *Chinnock* v *Sainsbury*[2], it was held that the Court would not compel the performance of the contract for an agency In *Morris* v *Delobbelflipo*[3], it was held that the agreement was one of agency and consequently not one of which specific performance would be decreed by a Court of Equity In *Davis* v *Foreman*[4], referring to a clause that employer would not terminate manager's employment except for misconduct, it was held that the clause though negative in form was affirmative in substance being equivalent to a stipulation by the employer that he would retain the manager in his employ and an injunction ought not to be granted But as I have already pointed out the law in India is not the same as in England. Even in England the position seems to be that the servant has the same rights as the master in similar circumstances In Halsbury's Laws of England, Hailsham Edition, Volume 22, at page 169 it is laid down as follows :

" The Court will not decree specific performance of a contract of service at the suit of the master or of the servant, partly on the ground that the contract is based upon mutual confidence, and partly because the Court is not in a position to supervise the manner in which the contract is performed. *Where, however, the contract of service includes a negative stipulation by which the master or the servant binds himself not to do a specific act, the Court while declining to enforce specific performance of the contract as a whole, will enforce the negative stipulation and will restrain the master or servant by injunction from committing a breach thereof* The negative stipulation must, however, be expressed on the face of the contract, or at least be clearly implied from its language, , it is not sufficient for this purpose to show that the act done is inconsistent with some possitive stipulation in the contract An injunction will not however be granted at the suit of the master where he is himself the first to break the contract "

Therefore I should consider that in a case like this the Court has the power to grant a permanent injunction

The question still remains whether in the circumstances of this case it is just and necessary to grant an injunction and where the balance of convenience lies As I have already mentioned, this is not a case where an irreparable injury would be caused to the plaintiff The plaintiff could be given an adequate remedy by way of damages The contract itself is to run till 31st March, 1967. The suit cannot be disposed of before 31st March, 1967 To give a temporary injunction would really be to enable the plaintiff to get what he wants in the suit itself Considering these facts and considering further the fact that the defendants are distributors of pharmaceutical products and if they are prevented by an injunction in distributing them they would have to entrust the distribution to the plaintiff in which case the performance of the contract would never be adequately supervised by Court. this is not a case for temporary injunction The public would also stand to suffer because of the non-availablity of the pharmaceutical products for which the defendants are distributors I do not think that there is any justification for granting an injunction in favour of the plaintiff. The appeal is therefore allowed and the injunction granted by the lower Court is vacated There will be no order as to costs

V. K.

Appeal allowed.

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1 (1948) Australia 28.
2. 3 L.T. 258.
3. L R (1892) 2 Ch 352.
4. L.R. (1894) 3 Ch. 654.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE M ANANTANARAYANAN AND MR. JUSTICE K S. RAMAMURTI.

N. S Rathnam .. *Appellant**

v.

S. Thangasami Pillai and others .. *Respondents.*

Hindu Law—Joint family—Claim that a business or property is joint—Evidence and proof necessary to establish—Presumption and onus

Under Hindu law if a member of a joint family, be he, the father or the managing member of the family carries on any business, the presumption is that it is his own separate business and when any member claims the business as joint family business, the burden is upon him to establish it

The perspective of approach, the burden of proof and the quantum of evidence to be adduced whenever any claim is made that any item of property is joint family property is now well settled Mere proof of the existence of the joint family owning some joint family property does not give rise to any presumptions It must be established that the family possessed some joint property which from its very nature and relative value may have formed the nucleus sufficient and adequate in character so as to impress the acquisitions with the character of the joint family property Mere existence of a nucleus however small or insignificant is not enough What has to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent acquisitions could be made

Where the income from ancestral property was not sufficient even for the maintenance of the members of the family, or where the outgoings exceeded the value of the nucleus the plaintiff cannot be said to have discharged the initial burden which lay on him In such cases it ought not to be presumed that the separate earnings of the member were spent on maintenance and other purposes binding upon the family for it is quite natural for a member to keep his self-acquired property separate at the same time utilising the joint family property and its income for purposes binding upon the family Further, when the facts and the circumstances in which the properties were acquired are known, no question of any presumption would arise

The plaintiff cannot build any argument in his favour relying upon the acts of bounty to the disadvantage of the maker thereof

Appeal against the Decrees of the Sub-Court, Pudukottai, in O S No 6 etc. of 1958.

R. Gopalaswami Ayyangar and *T. S. Krishnaswami Ayyangar,* for Appellant

K. Rajah Ayyar, M K. Harihara Ayyar and *K. Krishnamurti,* for Respondents.

The Judgment of the Court was delivered by

Ramamurti, J—These three appeals arise out of three suits, which were disposed of by the learned Subordinate Judge, Pudukottai, by a common judgment The substantial question involved in all the three suits is the same and as the three suits were inter-connected they were tried together by consent of parties.

It is first necessary to set out the following geneological tree to show the relationship between the parties :

Chinniah Pillai (d in 1929)

- N S Swamikannu Pillai (died)
  - Thangasami Pillai (deft. 1)
  - S Prakasam (deft 2, Minor)
  - P. Mary (daughter deft 4)
- Parvathammal (defendant 3)
- Singarayar Pillai
- Nalliah
- Doraisami Pillai
- Rathinam Pillai (Plaintiff)

The first suit O S. No. 6 of 1958 has been filed by the plaintiff herein (the appellant in these appeals), one Rathinam Pillai, for partition and separate possession of half-share in the properties set out in the schedule appended to the plaint after taking into consideration, the properties mentioned in the C Schedule which have been given to him. In this suit Chinniah Pillai's son (Swamikannu's brother) Rathinam Pillai is the plaintiff, Swamikannu's two sons and daughter are

* A Nos 55, 353 and 354 of 1960. 18th March, 1966.

respectively defendants 1, 2 and 4, while Swamikannu's wife is the 3rd defendant The case is that his father Chinniah Pillai was a native Christian, and that even though the father and the sons are all Christians, they followed the customary Hindu law of succession and inheritance, with the incidents of the law of joint family and coparcenary property. The plaintiff's case is that his father, Chinniah Pillai, was carrying on a grocery shop and a money-lending business on a large scale at Ceylon for nearly 35 years before his death in 1929, that sometime prior to his death Chinniah Pillai came to Tirumayam, his native place, and at that time, Swamikannu was in Colombo looking after the business, that after the death of Chinniah Pillai, the money-lending business and the grocery shop at Ceylon were managed by Swamikannu, the eldest member of the family, that with the aid of the business assets and the assets of the money-lending business, Swamikannu acquired several items of properties, that his two brothers, Singarayar and Nalliah were married out of the common funds of the family, that in 1907, Swamikannu obtained a release deed from the two brothers, Singarayar and Nalliab, that in 1942, Swamikannu obtained another release deed from the other brother, Doraisami, that thereafter, the plaintiff and Swamikannu alone continued to live together in the family house as members of a joint family, that Swamikannu was throughout very much attached and affectionate towards the plaintiff till Swamikannu died suddenly on 18th November, 1956 at Madras and that all the properties, whether immovable, movable, cash and outstandings and shares in companies, whether in the name of the plaintiff or in the name of Swamikannu, are all joint family properties in which the plaintiff would be entitled to a half share

The plaintiff's further case is that he was studying in the college till 1943 (the expenses of education being met by Swamikannu), that in 1943 a wholesale paddy and rice and grocery business and business in other items was started in the name and style of Swami Stores, with the aid of ancestral assets brought from Ceylon, that the business was carried on with the aid of ancestral nucleus and by the joint exertions of labour and skill of the plaintiff and Swamikannu, that in 1953 another business in cement tubes was started in Thambu Chetti Street, Madras, and that the plaintiff is entitled to a half share in all the business assets, as the investments therein and the money-lending business at Madras were all taken from the assets of Swami Stores, Tirumayam.

The plaintiff's further case is that in June, 1954, Swamikannu with the consent of the plaintiff gave the grocery business at Tirumayam to the plaintiff on a valuation of Rs. 10,000, that the sum of Rs. 10,000 was debited against the plaintiff in the accounts, that the money-lending business at Tirumayam and in Madras were kept common. The plaintiff also alleged that shortly thereafter Swamikannu arranged to make separate allotment of properties in the name of the plaintiff and in the names of the members of Swamikannu's family, defendants 1 to 4, that by such piecemeal allotments, C schedule properties were allotted to the plaintiff, D schedule to the first defendant, E schedule to the second defendant, F schedule to the third defendant, G schedule to the fourth defendant, and that such piecemeal allotments were made with the idea that they would be finally taken into account when a division by metes and bounds is effected between the plaintiff and Swamikannu and that at that final partition, the plaintiff would be allotted his legitimate half share in all the properties.

The plaintiff's further complaint is that when Swamikannu died all on a sudden on account of heart attack on 18th November, 1956, the relationship between the plaintiff on the one side, and defendants 1 to 4 was cordial for sometime, but that later on it became strained and serious misunderstandings arose between the parties. The plaintiff further stated that as in certain proceedings in High Court in O P No 211 of 1957 and with regard to certain deposits in the banks defendants 1 to 4 asserted rights on the footing that all those properties were the self-acquisitions of Swamikannu, and that the plaintiff was not entitled to any right or share therein, the plaintiff was obliged to file the present suit to establish his rights to a half share.

O S. No. 20 of 1958, the second suit, has been filed by Rathinam Pillai claiming a half share on the amounts due under two promissory notes executed by defendants 1 to 3 in the said suit in favour of late Swamikannu, on the ground that the moneys advanced to defendants 1 to 3 represented moneys of the joint family. Defendants 4 to 7 in the said suit are Swamikannu's two sons, widow and daughter respectively. The third suit, O.S No 34 of 1958 was filed by the two sons and the widow of Swamikannu The first defendant therein is Rathinam Pillai, the second defendant is one Annamalai Chettiar, a debtor and the third defendant is the daughter of Swamikannu. Rathinam Pillai has obtained a decree against this Annamalai Chettiar in O.S No 36 of 1955 on the basis of a promissory note which was executed in favour of Swamikannu, but subsequently assigned in favour of Rathinam Pillai The case of the plaintiffs in O S No 34 of 1958 is that Swamikannu assigned the promissory note in question to Rathinam Pillai merely for the purposes of collection as an agent, and that Rathinam Pillai should be directed to pay over the collections made by him, and also be restrained by an injunction from making further collections Rathinam Pillai's defence to this suit is that his brother, Swamikannu, gave away this item of asset assigning the promissory note in his favour as a piecemeal allotment, and that he is entitled to the benefit of the decree in O S No 36 of 1955

The defence of the defendants in the two suits, O.S Nos. 6 and 20 of 1958 (the members of the family of Swamikannu) is to the effect that the parties are governed only by the Christian law of succession, that there was no relationship of members of a joint family as between them as understood under Hindu law and that after the introduction of the Pudukottai Christian Inter-State Succession Regulation of 1938, there was no question of any election or choice, that the parties are governed only by the Christian law of succession, and that on Swamikannu's death, they alone became entitled to all his properties, and that the plaintiff, Rathinam Pillai, was not entitled to any right or share therein The defendants also alternatively contended that the properties left behind by Swamikannu on his death are all his own separate self-acquisitions, that Chinniah Pillai did not leave any assets worth mentioning at the time of his death in 1929, that Swamikannu by his own efforts unaided by any ancestral nucleus acquired all the properties from time to time, and that as a matter of fact, when Chinniah Pillai died, the debts far exceeded the assets left behind him, and that there was no question of Swamikannu taking over the business of his father, and acquiring properties with the aid of the business assets. The defendants stated that Swamikannu out of purely brotherly love and affection, and out of generosity educated his younger brothers, gave them moneys for their expenses, that he had obtained release deeds from the three brothers in all of which they have clearly admitted that the properties acquired by Swamikannu were all his own separate self-acquired properties The defendants further pleaded that Swamikannu was particularly attached and affectionate towards his youngest brother, Rathinam Pillai, that he educated him and gave him some training in the several businesses, that later on, he gave the Tirumayam Stores to the plaintiff at a valuation of Rs. 10,000, that out of generosity, the plaintiff was given some shares in Gitanjali Press, that purely out of love and affection and as a gift, he gave some properties mentioned as a gift, he gave some properties mentioned in the C schedule to Rathinam Pillai, and that whatever was given either by Swamikannu or by members of his family were purely as gift and nothing more and was not given in recognition of any right of Rathinam Pillai.

As regards O S. No 20 of 1958, they contended that Rathinam Pillai had no right to sue the debtors as moneys belonging to Swamikannu were advanced as loans and that the debtors have settled the matter with the defendants

Rathinam Pillai's claim was negatived in all the three suits. The suit for partition, O.S No 6 of 1958, was dismissed on the ground that the properties in which Rathinam Pillai claimed a share were not joint family properties, but the separate and self-acquired properties of Swamikannu. The learned Subordinate Judge also held that after the Pudukottai Christian Inter-State Succession Regulation of 1938 came into force the heirs of Swamikannu, *i.e.*, his widow and children alone,

would be entitled to Swamikannu's properties, and that Rathinam Pillai was not entitled to make any claim on the basis of either a joint family or a coparcener.

In O S No 20 of 1958, the learned Judge held that the amounts which were sought to be recovered from the debtors formed part of the estate of Swamikannu, that the plaintiff was not entitled to file a suit in respect of the same, and that the settlement which was entered into between the debtors and Swamikannu's widow and children operated as a discharge of the amounts claimed In this view that suit was dismissed.

O S. No 34 of 1958, the suit filed by the widow and sons of Swamikannu, was decreed on the finding that the promissory note which formed the subject-matter of the suit O.S No 36 of 1955 was assigned to Rathinam Pillai merely as an agent for collection, and that the decree obtained in O S. No. 36 of 1955 must enure only for the benefit of Swamikannu's widow and sons

Rathinam Pillai has preferred appeal, Appeal No 55 of 1960 from the judgment and decree in O S No 6 of 1958 He has also preferred the appeals, App als Nos 353 and 354 of 1960 against the judgment and decree in O S. Nos 20 of 1958 and 34 of 1958 respectively.

From the foregoing narration of facts, it will be clear that the main appeal is Appeal No. 55 of 1960, arising out of the suit for partition filed by Rathinam Pillai, O S No. 6 of 1958. In fact Counsel on both sides agreed that the decision in this appeal will practically govern and conclude the decision in the other two appeals.

On a careful consideration of the entire oral and documentary evidence, in the light of the elaborate and detailed arguments advanced before us by Counsel on both sides, we have no hesitation in coming to the conclusion that the view taken by the trial Judge is perfectly correct and sound, and is amply supported by the evidence on record. The documentary evidence in this case is overwhelmingly against the plaintiff and in favour of the defendants Further, the plaintiff's own conduct from the time he became a major till the death of Swamikannu in 1956, clearly tends to the same conclusion.

Before we proceed further, we think that it is but fair that we must advert to one important aspect of the case. Swamikannu has throughout acted in a very generous manner and that even though both factually and legally all the properties constituted his own self-acquired separate properties, Swamikannu had out of love and affection and purely out of generosity had given substantial properties to the plaintiff. Learned Counsel accepted the position that the properties which were given to Rathinam Pillai will be of the value of Rs. 40,000 in the year 1956. We are clearly of the opinion that the present suit is a purely speculative and a frivolous one filed by the plaintiff solely out of greed, and as a blackmail, exploiting the helplessness of the widow and the sons of Swamikannu, of whom one is yet a minor. In filing this sp culative suit, the plaintiff has taken advantage of the fact that he is in possession of the account books, records and correspondence of which he has produced a portion only, and suppressed the rest, which, if produced would expose the falsity of this claim.

In analysis of the evidence in this case, it will be convenient to divide it into two periods (*a*) the period up to the death of Chinniah Pillai , and (*b*) from the death of Chinniah Pillai in 1929 till the death of Swamikannu in 1956.

Learned Counsel for the appellant conceded and accepted the position that under Hindu law if a member of a joint family, be he, the father, or the managing member of the family, carries on any business, the presumption is that it is his own separate business, and that when any member claims the business as joint family business, the burden is upon him to establish it Vide *Chattanatha Karayalar* v. *Ramachandra Iyer and another*[1]. Learned Counsel, while accepting this legal position, contended that the plaintiff has rebutted the presumption and has established

1 (1955) 2 S.C.R 477 A.I R 1955 S C. 799

that the business is the joint family business on the ground that the plaintiff had proved that Swamikannu, when he carried on the business in question carried on the same with the assistance of ancestral nucleus, that is, the assets of the grocery business and the money-lending business which Chinniah Pillai was carrying on in Ceylon. The question, therefore, naturally arises as to the character and the magnitude of the two businesses and whether Swamikannu really got into possession of any assets which could be regarded as nucleus in the legal sense of the term, with the aid of which, it could be claimed, that Swamikannu carried on the subsequent business and made acquisitions therefrom It must be mentioned at the outset that the evidence relating to the business activities of Chinniah Pillai up to the time he lived in Ceylon is very very meagre, and practically worthless, and does not support the plaintiff's case On the other hand, such available evidence as has been adduced by both sides shows that the business which Chinniah Pillai carried on was a very small business, and that at the time of his death the liabilities far exceeded the assets, and that whatever Swamikannu did at that time in relation thereto was merely a process of winding up and that there was no question of Swamikannu utilising any of the assets in the business which he carried on In fact, there is absolutely no evidence connecting the assets of the business left behind by Chinniah Pillai, with the businesses which Swamikannu carried on after Chinniah Pillai's death.

Learned Counsel for the appellant relied upon the following features in support of his case· (i) When Chinniah Pillai died Swamikannu remained in Colombo and carried on business from 1929 to 1945, (ii) Accounts of Swamikannu have not been produced, the same having been suppressed by the widow , (iii) The release deeds taken by Swamikannu from the brothers offered intrinsic evidence that the father Chinniah Pillai had left business assets which had come into the hands of Swamikannu and that the burden is upon the widow to prove the extent of the assets; (iv) The oral evidence of the two brothers P.Ws. 2 and 3, Singarayar and Doraiswami, should be accepted as these are the only two people who can give evidence regarding the extent of the businesses of their father, Chinniah Pillai ; (v) (*a*) Exhibits B-29 and B-30, the proceedings in the Colombo Court showing that Chinniah Pillai and Swamikannu were carrying on business at Colombo, (*b*) Conduct of Swamikannu purchasing properties in the name of the plaintiff and endorsing the promissory note in his favour , (*c*) Several letters which passed between Swamikannu and the plaintiff tending to show that Swamikannu regarded the plaintiff as a member of a joint family having a share in the properties.

We have carefully examined the arguments of learned Counsel in respect of the abovesaid features on which he placed reliance but we are unable to accept his contentions.

* * * * *

(His Lordship then discussed the evidence in the case and proceeded.)

We accept the reasoning of the learned Subordinate Judge in paragraph 82 of the judgment and hold that Swamikannu having earned large fortunes by his individual efforts and business enterprise made some provision for the plaintiff out of attachment and affection and for no other reason.

In the estate duty proceedings as observed earlier, the plaintiff himself assisted the first defendant, while preparing a return and stated that all the properties were the separate properties of Swamikannu. We concur with the criticism of the learned Subordinate Judge, that it was only in the latter stages that the plaintiff conceived the fraudulent idea of making this claim and that with that end in view manoeuvred to have the secret recital in Exhibit A-94 that the plaintiff was claiming a share in the estate. That plaintiff is guilty of fraudulent conduct in this matter is clear from the fact that he never agitated this claim before the estate duty authorities or before any tax authorities. It is unnecessary to make any further reference to the other oral or documentary evidence in this case.

As regards the two other appeals learned Counsel did not contest the findings of the learned Subordinate Judge. The discussion of the evidence with regard to

the other two cases are contained mainly in paragraphs 29, 30 and 44 of the judgment of the trial Court and we are satisfied that the findings are correct, and no exception can be taken against the same In fact, as observed earlier, learned Counsel for the appellant did not canvass the correctness of these findings and he focussed his attention only upon the main appeal, Appeal No 55 of 1960.

Before we sum up we would like to make a reference to the leading decisions touching upon the perspective of approach, the burden of proof and the quantum of evidence to be adduced whenever any claim is made that any item of property is joint family property The Hindu law upon this aspect of the case is now well settled and does not admit of any controversy or doubt Mere proof of the existence of joint family owning some joint family property does not give rise to any presumption It must be established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the disbursements towards discharge of debts etc , should be taken into account and a comprehensive view should be taken as to whether in the particular set up of the family, the joint family property could be regarded as a nucleus sufficient and adequate in character so as to impress the acquisitions with the character of the joint family property. Mere existence of a nucleus however small or insignificant is not enough. Vide *Vythinatha* v *Varadaraja* [1], *Venkataramayya* v. *Seshamma*[2], *Appalaswami* v. *Suryanarayanamurti*[3], and *Venkatasami* v. *Radhakrishna*[4]. Where the income from the ancestral property was not sufficient even for the maintenance of the members of the family, or where the outgoings and disbursements exceeded the value of the nucleus, the plaintiff cannot be said to have discharged the initial burden which lay on him. In such cases it ought not to be presumed that the separate earnings of the member were spent on maintenance and other purposes binding upon the family for it is quite natural for a member of the joint family to keep his self-acquired property separate from the joint family property, at the same time utilising the joint family property and its income for purposes binding upon the family such as maintenance of the members of the family and discharging of debts. Further when the facts and the circumstances in which the properties were acquired are known, no question of applying any presumption would arise The law relating to the second phase of the burden of proof is stated thus in *Ramakrishna Mardi* v. *Vishnumoorthi Mardi*[5]:

" The learned Subordinate Judge was of the view that when once the ancestral nucleus is admitted the onus lies on the manager of the joint Hindu family to prove that the properties acquired were his self-acquisitions This is stating the proposition of law in very wide terms The existence of a nucleus is not the sole criterion to impress the subsequent acquisitions with family character What has to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent acquisitions could be made This is the second phase in the onus of proof which lies on the person who sets up the family character of the properties In these circumstances, after perusing the evidence of P W 1 and D Ws 1 and 2, we do not think that 100 mudis of rice would leave an appreciable surplus so as to form a basis for the acquisition of properties "

We are also of the opinion that the plaintiff cannot build any argument in his favour relying upon the acts of bounty of Swamikannu:

" It would not be reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer of them "

Vide *Lala Moddun Gopal Lal* v. *Khikkinda Koer*[6]. It is sufficient to extract the last head-note in *Appalaswami* v. *Suryanarayanamurthi*[3].

" It is dangerous to construe act of generosity or kindness as admissions of legal obligation Hence the fact that at the instance of mediators assisting in the partition one of the members of the joint family agreed to apply some of his self-acquired property for the benefit of the members of the family cannot be taken as establishing that the member intended to bring into partition his entire self-acquired interest "

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1 (1938) 1 M L J 216 I L R (1938) Mad 696 . 48 L W 628 A I R. 1938 Mad 841

2 I L R (1937) Mad 1012 45 L W 422 A I R. 1937 Mad 538

3. I L R (1948) Mad 440 (1947) 2 M L J 138 · 60 L W. 412 A I R 1947 P C 189.

4 A I R 1963 A P 476

5 (1956) 2 M L J 550, 552 69 L.W 795 : A I R 1957 Mad 86

6 L R (1891) 18 I A 9 · I L R (1891) 18 Cal 341, 348 (P C)

To sum up, therefore, the position is as follows : There is absolutely no evidence regarding the character and the extent of the businesses carried on by Chinniah Pillai in Colombo. There is equally no evidence that Swamikannu got into possession of any productive ancestral nucleus of the father with the aid of which it could be said that Swamikannu made the acquisitions. Such evidence as there is shows that the debt and liabilities left behind by the father far exceeded the assets The plaintiff has not adduced any evidence to rebut the presumption under Hindu law that the business carried on by Swamikannu were his own separate businesses. The only evidence adduced by the plaintiff is that of his two brothers P Ws. 2 and 3, whose testimony is obviously interested being employees under the plaintiff Further the recitals in the release deeds executed by them in favour of Swamikannu show that these two witnesses are thoroughly unreliable witnesses and have no scruples for giving perjured evidence of the worst character The recitals further prove the most important fact that the brothers were having and carrying on separate business of their own. The plaintiff's own conduct, right from the time he left the college, furnishes very valuable evidence and it is wholly inconsistent and destructive of the present claim made by him He has not put forward this claim (based upon the Ceylon business as ancestral nucleus) in his notice which preceded the suit. The two documents Exhibits B-3 and B-27 and the entries in the account books of Swamikannu lead to the only inference that the plaintiff's case is wholly false and unfounded The Swami Stores which is the sheet anchor of the plaintiff's claim has been clearly proved to be the separate business of Swamikannu. A scrutiny of the plaintiff's evidence shows that he has no regard for truth and there is no limit for his giving perjured evidence in Court We have, therefore, no hesitation in confirming the judgments and decrees of the Court below in all the three cases In the view we have taken, it is unnecessary to consider the effect and operation of the Pudukottai Christians Inter-State Succession Regulation

It is unfortunate that the plaintiff who could never have entertained any honest belief in the truth of the case, and who must have fully realised that his claim was baseless should have been ill-advised to plunge into the wasteful litigation The admission in his evidence show that he is a mere tool in the hands of interested and mischievous parties, with the result that he has squandered away a substantial portion of Swamikannu's bounties in this frivolous litigation The answers given by the plaintiff at page 141 of the combined documents, in the cross-examination, show that admittedly the plaintiff does not know the facts personally, and that he has been instigated and set up by his father-in-law and others, who are Court-birds. We do not see any reason whatsoever as to why the usual order of costs following the event should not be passed.

We, therefore, dismiss all the appeals with separate costs in all the three appeals.

V.K. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE K S VENKATARAMAN

Natarajan *Petitioner*.*

Criminal Procedure Code (V *of* 1898), *sections* 161 (3) *and* 173 (4)—*Combined effect—Notes jotted down by police officer earlier—Statements recorded later—Copies of statements furnished to accused—If should include the notes.*

Section 161 (3) of the Criminal Procedure Code says that a police officer may reduce to writing any statement made to him by any person in the course of an examination under the section and if he does so he shall make a separate record of the statements of each such person whose statement he records Under section 173 (4) of the Code the officer in charge of a police station is required to furnish to the accused *inter alia* a copy of the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses The question whether the statement contemplated under section 161 (3) is only the statement recorded at the police station or will include the notes jotted down by an Inspector earlier will have to be decided according to the circumstances of each case. Section 161 (3) does not prevent a police officer from making just a few jottings for refreshing his memory. The mere fact that such jottings were destroyed will not vitiate

* Crl R C No 1490 of 1966
(Crl. R P No 1458 of 1966). 21st November, 1966.

a trial so long as it is not part of the statements reduced to writing at the police station, which alone will be relevant for purposes of section 161 (3).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Eighth Presidency Magistrate of the Court of the Presidency Magistrate, George Town, Madras, dated 7th November, 1966 and passed in C.C Nos 14270 and 14271 of 1966

S Sheik Md. Ansari, for Petitioner.

The Court made the following

ORDER.—This Revision Petition has been filed by one Natarajan against his conviction under section 4 (1) (*a*) of the Madras Prohibition Act, and section 447, Indian Penal Code The allegation against him is that he had trespassed into the premises of the Harbour for transportng three bottles of whisky without a permit He was arrested with the three bottles of whisky by a Sub-Inspector (P.W 2) within the Harbour premises at 4-30 P M on 22nd September, 1966 P.W 1 is another witness who was present besides others. The accused denied the offence The learned Magistrate accepted the prosecution evidence, convicted and sentenced him to rigorous imprisonment for three months, a fine of Rs 100 under section 4 (1) (*a*) of the Madras Prohibition Act, and rigorous imprisonment for two weeks under section 447, Indian Penal Code, to run concurrently with the other sentence This revision petition has been preferred by the accused.

The only point urged before me by the learned Counsel for the petitioner is that the Sub-Inspector (P.W 2) has admitted that he had jotted down some notes while examining P.W 1 and another person Main, at the scene of occurrence, and that their statements were reduced to writing under section 161, Criminal Procedure Code, only later at the police station after destroying the notes The accused has been supplied only with copies of the statements prepared at the police station and not copies of the notes The learned Counsel urges that this has vitiated the trial, and has relied on a number of decisions in support of his contention.

Section 161 (3), Criminal Procedure Code, says that the police officer may reduce into writing any statement made to him in the course of an examination under the section, and if he does so he shall make a separate record of the statements of each such person whose statement he records Section 173 (4), Criminal Procedure Code, as amended by Act XXVI of 1955, requires the officer in charge of the police station to furnish to the accused *inter alia* a copy of the statements recorded under sub-section (3) of section 161, Criminal Procedure Code, of all the persons whom the prosecution proposes to examine as its witnesses The question therefore is whether the statement prepared at the police station is the statement which was reduced into writing or only the earlier notes which were jotted down. The question may have to be answered in regard to the circumstances of each case, and so far as this case is concerned, it does not appear that the notes which were jotted down would themselves have been intelligible to another person. They might have been just enough to enable the Sub-Inspector to remember the essential particulars. Section 161 (3) does not seem to prevent the Sub-Inspector from making just a few jottings for refreshing his own memory So far as this case is concerned, I feel no difficulty in holding that the statements which were reduced into writing at the police station immediately after the Sub-Inspector reached there, are the statements relevant for the purpose of section 161 (3) It has also to be emphasised that the material circumstances had been brought out in the mahazar which was prepared at the scene of occurrence itself.

The circumstances in the cases cited by the learned Counsel were different from those of the present case, and those cases do not therefore really help him The cases are . *Pulukuri Kottayya* v. *Emperor*[1], *Lingappa* v. *State*[2], *Sugali Latchigadu* v. *State*[3], and *Rangaswami Goundan* v *State*[4].

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1 (1947) 1 M L J 219 L R (1947) 74 I A 65 I L R (1948) Mad 1 (P C) (1947) M W N (Crl) 45

2 (1950) 2 M L J 766. (1951) M W.N (Crl) 15 (2)

3 (1952) 1 M L J 42 (1952) M W N (Crl) 12

4 (1957) M L J (Crl) 13. I L R (1957) Mad 482 (1956) M W N (Crl) 222

In *Pulukuri Kottayya* v *Emperor*[1], the Sub-Inspector did not initially furnish the note book which contained the earliest statements made by the five prosecution witnesses (at the inquest), and in fact, maintained that no such statements were recorded What was furnished to the accused was only copies of the statements made later to the Circle Inspector of Police But at a late stage, the trial, when the Sub-Inspector was examined, he himself produced the note book and it was found that there were no vital discrepancies between the statements contained in the note book and the statements of the witnesses in the witness box Their Lordships of the Privy Council pointed out that, where the statements are never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused. However, they were satisfied that, in the peculiar circumstances of the case, no prejudice was occasioned to the accused by the failure to produce in proper time the note book It was on a different point that their Lordships remitted the appeal for re-hearing by the High Court

Lingappa v *State*[2], was a case where the statements under section 161, Criminal Procedure Code, were not made available to the accused at all.

Sugali Latchigadu v. *State*[3], was a case where the Sub-Inspector made short notes of the statement of the witnesses at the inquest and they were destroyed even before the arrival of the Circle Inspector The present case is distinguishable, because here the notes were only brief and were actually reduced into writing at the police station and copies of the statements prepared at the police station were furnished to the accused.

Rangaswami Goundan v *State*[4], was a case where statements were recorded in Tamil, but only translations in English of those statements were furnished to the accused. It was held that failure to furnish the Tamil statements which were the original statements, vitiated the trial That is not the case here.

Apart from the point made by the learned Counsel, there is no reason to interfere with the convictions. The revision petition is, however, admitted on the question of sentence

The case came on for orders after admission.

S. Sheik Md Ansari, for Petitioner

K. A Panchapagesan, for Public Prosecutor, on behalf of the State.

The Court made the following

ORDER —This was the first offence Hence the period of imprisonment is reduced to the period already undergone The fine and the default sentence will remain Time for payment of fine, one month from this date.

R M. *Conviction affirmed ; but sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T RAMAPRASADA RAO

Anandhayee Ammal .. *Petitioner**

v.

S. M. Khaja & Co., by partner, Seedi Mohamed .. *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (a) (i) and (iii)—Bona fide *required for landlord's occupation—Proof—Application under section 10 (3) (a) (iii)—Requirements*

It has been repeatedly held by our Courts that in case a landlord or landlady requires his or her only premises for his or her own occupation the question of *bona fides* is alien for consideration and need not at all be gone into unless there are compelling circumstances to disbelieve the version of the landlord or the landlady, totally

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1 (1947) 1 M.L J 219 L R (1947) 74 I A 65 I L R (1948) Mad 1 (P C) (1947) M W.N (Crl.) 45

2. (1950) 2 M L J 766 (1951) M W N (Crl.) 15 (2)

3 (1952) 1 M L J 42 (1952) M W N (Crl.) 12

4 I L R (1957) Mad 482 (1957) M.L.J. (Crl) 13 (1956) M W N (Crl) 222

* C R.P No 108 of 1965 15th December, 1966.

Where there is a foundation or reasonable material for a Judge to come to the conclusion that there is a business either by the landlord or landlady or his or her son, as the case may be, and it is for that business that the premises is required, there is no reason why the Tribunal should not apply strictly section 10 (3) (*a*) (iii) which makes it clear that the landlord would as a matter of course by entitled to it once that requirement is established It is not necessary that the son should carry on a business in the city, town or village in which the property is situate to enable the father or mother to apply under section 10 (3) (*a*) (iii)

Petition under section 25 (1) (*a*) (ii) of the Madras Act XVIII of 1960 praying the High Court to revise the order of the Court of the Small Causes (III Judge) Madras, dated 18th September, 1964, and made in H R A No. 104 of 1964 (H.R.C. No. 425 of 1963 on the file of the Rent Controller, Madras)

K Muthuswami Chettiar and *O Radhakrishnan*, for Petitioner.

K. Venkataraman, for Respondent.

The Court delivered the following

JUDGMENT —The landlady is the petitioner before me She applied for eviction on the ground that she required her only premises, No 68, Linghi Chetty Street, Madras, both for residential and non-residential purposes The need for residential purposes is purely personal to her and the need for non-residential purposes is for the purpose of her son, who is carrying on a Chemists and Druggists shop at Tirukazhikundram, to open up a branch here at Madras in the suit premises. The premises in question is admittedly a premises which is being used both for residential and non-residential purposes In fact, the respondent himself admits that the premises is being used for residential purposes as well as that he is carrying on a business therein. The petitioner examined herself and her son The petitioner would state that she requires this premises for her own use, but she would not categorically state that the premises is also required for non-residential purposes for her son. But the son who went into the box as P W. 2 would state that he intends setting up a branch of his Chemists and Druggists shop at Madras The respondent-tenant objected to this petition on two grounds, one that the requirement is not *bona fide*, and secondly, the petition is motivated because the landlady was from time to time increasing the rent and, since the tenant failed to respond to a call for a further increase in rent this petition has been filed.

The learned Rent Controller, who went into the question, held on the question of *bona fides* that the claim of the petitioner is not *bona fide*. He mainly rested his conclusions on the demands for increased rent made in the year 1958 and presumed that the intention of the landlady in instituting this action can also be presumed to be for purposes of obtaining an increased rent The appellate authority again rested its conclusions on a comparison of Exhibits R-3 and R-4, which were the notices exchanged between the parties in connection with the increase of rent The appellate authority is also of the opinion that Exhibit R-3 was issued only with the ulterior object of increasing the rent The appellate authority continues to observe the moment that object was fulfilled, the petitioner kept quiet. She has resumed her attack again in the present petition because a few years have elapsed and she felt that she would be entitled to a further increase in rent

The same contentions are pressed before me by Mr Srinivasa Iyer, on behalf of the tenant Mr Srinivasa Iyer urges that the petition is not only falling short of *bona fides* on the part of the petitioner, but is *ex facie mala fide* because it is only a ruse or an instrument to secure a higher rent He also adds that the son of the petitioner, who is admittedly carrying on a business at Tirukazhikundram, and not in the city, cannot under section 10 (3) (*a*) (iii) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) ask for possession of the building from the tenant in the circumstances stated above He also states that the requirement of the premises for purposes of the son's business is a myth.

It has been repeatedly held by our Courts, the decisions to which I would presently refer, that in case a landlord or landlady requires the premises of his or her own for his or her own occupation, the question of *bona fides* is alien for consideration and need not at all be gone into unless there are compelling circumstances to disbelieve the version of the landlord or the landlady, as the case may be, totally I am

not able to see such compelling reasons in this case so as to brush aside the request of the landlady for her only house in the city for her own residence The question of *bona fides* no doubt is a subjective element But even in finding out the truth of such a subjective element, we could safely sift the evidence on record to find out whether it is a totally *mala fide* claim on the part of the petitioner concerned. Here, the petitioner is a lady aged about 77 years, who seeks to reside in her own premises at that age at least amidst her relatives, and particularly her other sons who are in Madras and her daughter, who is also in Royapuram. It does not appear to me to be a very strange request on the part of the 77 year old lady to come over and permanently stay in the midst of her relations and particularly when her first son who is in Tirukazhikundram intends to open a branch of the Chemists and Druggists shop at Madras

In *Abdul Kareem* v *C. M Mohamed*[1], Ramachandra Iyer, Officiating Chief Justice, as he then was, observed in very strong terms that where a landlord seeks to evict a tenant from his building on the ground that he requires the same for his own occupation, what has to be found is whether the petitioner requires his own building for purposes of his own occupation He adds that no question of *bona fides* at all arises in such circumstances This decision has been followed by Venkatadri, J, in *Bathool Bai* v *Vaidyanathan*[2] His Lordship observed as follows —

> " Apart from cases of gross unreasonableness on the part of the landlord, if it is established that there is a genuine present need of the house for the landlord's own occupation the Court cannot presume *mala fide* because of factors such as the landlord's having other house or his or her being a single soul or that he or she is not permanently living in the city or town concerned The fact that the landlord is living in a rented house would be enough to satisfy the Court about the *bona fides* of the requirement "

I need not multiply the authorities on this subject except to refer two unreported decisions of our Court, one of Alagiriswami, J, in C R P No 1278 of 1966 and of Natesan, J, in C R P No. 869 of 1962, wherein the same principle has been adumbrated. I am therefore satisfied that the approach by the lower Courts regarding the question of *bona fides* is thoroughly unwarranted in law and in the light of the principles laid down by the above judicial precedents I hold that the requirement of the petitioner is *bona fide*, as she requires it for her own use and occupation

The above result arrived at by me would be enough to dispose of the Civil Revision Petition But the other contention raised by the petitioner is that the building being both for residential and non-residential purposes, she would like to have the premises for the business of her son, who has given evidence in this case. P.W 2, the son of the landlady, has stated that he intends opening a branch of the Chemists and Druggists shop in the premises in question It is common knowledge that a Chemists and Druggists business cannot be carried on without a licence for the purpose under the enactments of our State Therefore, if the petitioner intends to shift the business from Tirukazhikundram to Madras, it cannot be stated that he is aiding his mother in her alleged *mala fide* object to secure a higher rate of rent from the tenant On the other hand, I believe P.W. 2 and hold that he intends to open a branch of his business in Linghi Chetti Street, Madras But as observed by Viswanatha Sastri, J, in *Venkataswami and Sons* v *Veerabadraswami*[3], there is no yardstick by which we can measure the range of activities necessary to constitute the carrying on of a business It is strenuously urged by the learned Counsel for the respondent that the opening of a branch office by the petitioner's son would not be a sufficient ground to enable the petitioner to ask for her own premises on the ground that it is required for her son's business I do not agree The essential requirement is that there must be a foundation or reasonable material for a Judge to come to the conclusion that there is a business either by the landlord or landlady or his or her son as the case may be, and it is for that business that the premises in question is required If such material is placed then there is no reason why the Tribunal should not apply strictly the section which makes it clear that the landlord would as a matter of course be entitled to it once that requirement is established. In this case the son is carrying

1 (1962) 1 M L J 382.
2. (1966) 2 M.L J 412.
3 (1956) 2 M L J (N R C) 70

on a business. In my opinion it is not necessary that the son should carry on a business in the city, town or village in which the property is situate which would enable the father or mother to apply under section 10 (3) (*a*) (iii) of the Act. Mr Srinivasa Iyer pointed out to me that unless the son carries on business in the city, the requirement of the section is not satisfied I am unable to be persuaded to agree to this contention

I therefore hold that the requirement of the premises in question for the purposes of setting up a business by her son also appears to be true and based on acceptable evidence I therefore hold on both the grounds that the premises is required for residential as well as non-residential purposes In the light of my judgment as above, the order of the appellate authority is set aside and the tenant is given four months' time to vacate The Civil Revision Petition is allowed There will be no order as to costs

V.K —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K SRINIVASAN

Srinivasalu Naidu . *Appellant**

v.

Kavalmari Munuswami Naidu and others . *Respondents*

Civil Procedure Code (V of 1908), section 9—Scope—Claim that a person is entitled to run a customary bull race—Is one of civil nature cognizable under the section

A claim that a person is entitled to run a customary bull race in a village during the month of *Thai-Masi* and that no one else has that right is a right of a civil nature and a suit for declaration and for permanent injunction restraining others from interfering with that right is cognizable under section 9 Civil Procedure Code

Section 9, Civil Procedure Code is in very broad terms. It states that all suits of a civil nature are within the jurisdiction of the Court, except those of which cognizance is either expressly or impliedly barred The *Explanation* to this section certainly does not confine the limits of the nature of suits contemplated by the main section What the *Explanation* states is only that though religious rites and ceremonies may form the basis of a right that is claimed, such right being a right to property or to office, a suit to establish such right would be a suit of a civil nature The section takes within its broad sweep all questions where one person claims any privilege in himself as against others. It cannot be assumed (as it seems to have been done by the lower appellate Court) that only a right which is claimed, in relation to a temple, such as the right to perform worship in a temple, or the right to receive religious honours or privileges attached to an office as its perquisite or remuneration, could be agitated under section 9

Appeal against the Decree of the District Court of North Arcot at Vellore, dated 20th September, 1962, in Appeal Suit No. 109 of 1961 preferred against the Decree of the Court of the District Munsif of Tirupattur in Original Suit No 80 of 1960

K N Balasubramaniam and *Azeez Basha,* for Appellant

D. R Krishna Rao, for Respondents.

The Court delivered the following

JUDGMENT —The plaintiff is the appellant He sought for a declaration of his right to run the customary bull race before the Gangaiyamman Temple and for a permanent injunction to restrain the defendants from interfering with his right His claim was that the bull race and a festival connected with it are conducted in the village during the month of Thai-Masi every year. According to the plaintiff, the right and the privilege to conduct the race and the festival belong only to him and that this right was, in the past exercised by his father. It was stated that the plaintiff usually gives wide publicity to the race and the festival in the neighbouring villages and also fixes a date therefor The residents of the village and the neighbouring villages participate therein Before the race commences, the plaintiff has *Pooja* performed is the temple, breaks the first ceremonial coconut and drives his bull first in the race He claims this as a hereditary right. It was alleged that

* S A. No 73 of 1963 22nd December, 1966

the defendants, some of whom are residents of other villages and one who has recently settled down in this village attempted to prevent the exercise of the right as claimed and it is for that reason that the suit was laid The defendant's contention denied the right claimed by the plaintiff. It was claimed that one Buddappa Naidu alone had this customary and hereditary right After him his son Dasariappa and after him his daughter's son, one Krishnappa Naidu, were exercising the right. It was contended that this Krishnappa Naidu is a necessary party to the suit. It was also claimed that the right the establishment of which was sought is not one of civil nature within the meaning of section 9, Civil Procedure Code, and that the Court has no jurisdiction to entertain the suit

The learned District Munsif found upon the evidence that the right set up by the defendants in Krishnappa Naidu was not established and that in any event, it was only the defendants who caused obstruction to the exercise of the plaintiff's right, which was also found upon the evidence Krishnappa Naidu was held to be not a necessary party. But, nevertheless, the learned District Munsiff, in dealing with the question of jurisdiction merely stated that though the plaintiff has proved his right to conduct his festival, there was no evidence to show that it is of a civil nature and proceeded to dismiss the suit.

The plaintiff appealed.

The learned District Judge found that there was ample evidence to show that it was the plaintiff and his father who were exercising the right in question for several years past The defendants' contentions to the contrary were rejected. But upon the question whether the suit is maintainable, the learned District Judge held that as the plaintiff did not claim to have any right to any office in the temple in question, and such a right cannot be said to form part of the worship in the temple, the right sought to be agitated is not within the purview of section 9 It upheld the decision of the Court below

The short question in this Second Appeal is whether the right claimed is not one of a civil nature, an adjudication of which is competent under section 9 of the Code of Civil Procedure. Section 9 is in very broad terms It states that all suits of a civil nature are within the jurisdiction of the Court, except those of which cognizance is either expressly or impliedly barred. The explanation to this section states that a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites and ceremonies. The explanation certainly does not confine the limits of the nature of suits contemplated by the main section. What the Explanation states is only that though religious rites and ceremonies may form the basis of a right that is claimed, such right being a right to property or to office, a suit to establish such right would be a suit of a civil nature The section takes within its broad sweep all questions where one person claims any privilege in himself as against others There is no doubt that such a question would be one of a civil nature If I understand the judgment of the lower appellate Court, it seems to have assumed that only a right which is claimed, in relation to a temple, such as the right to perform worship in a temple, or the right to receive religious honours or privileges attached to an office as its perquisite or remuneration, could be agitated under section 9, Civil Procedure Code The principal basis of the decision of the Courts below is that the right claimed does not form part of the worship in the temple It seems to me that the claim has been entirely misconstrued. The right was not claimed in relation to any temple at all or to any office or emoluments attached to it The reference to the temple or the right to break the first coconut is merely ancillary to the right claimed, which was the right to run the bull race What was averred and what was proved in the evidence was that the plaintiff was the person entitled to organise this bull race during the month of Thai-Masi and that before the bull race was started, the auspicious function of breaking the coconut to the Goddess was performed It is not the plaintiff's claim that on this particular day no one else should break any coconut in the temple. In so far as the breaking of the coconut was part of the principla event, namely,

the starting of the bull race, no one else could break the coconut as indicating the start of the bull race The plaintiff was not seeking a declaration of any rights in relation to the temple He claimed that he alone and no one else could start the bull race, and if as part and parcel of the starting of the bull race the breaking of the coconut was called for, that is not a right in relation to any religious practice or ceremony

What is a civil right can hardly be defined. It is perhaps possible to define what is not a civil right. Mr. Gopalaswami Ayyangar on behalf of the appellant referred to *Thirumalai Alwar Ayyangar* v *Lakshmi Sadagopa Ayyangar*[1] That was a case where the plaintiff claimed the exclusive right to conduct a *Mandagapadi* on the first day of the Pagalpathu Festival in a temple, paying all the expenses thereof, and receiving all the honours and emoluments appurtenant to that right. It was held that a suit to establish such a right is maintainable in the civil Court The learned Judges pointed out that the line dividing cases where the right to perform acts of religious worship is asserted and those where the right is to receive honours and emoluments is sometimes rather narrow In that case, the entire matter dealt with the right of worship associated with the receipt of the incidental honours or emoluments In the case before them, the right to receive the *Prasadam* and other honours connected with the performance of the *Mandagapadi* really involved nothing in the shape of emoluments which could be said to be attached to an office and that was the contention advanced before the learned Judges. But they noticed that a right would always be associated with a corresponding obligation and thought that even the performance of services by the plaintiff claiming the right could be legally enforced. They referred to the finding that from time immemorial such a right had been exercised by the plaintiff's family and they were satisfied that the right was enforceable in the civil Court. It was observed that the right claimed was a right to perform acts of worship in a particular manner and with particular incident attached to it, virtually bringing it within the scope of the *Explanation* to section 9 It would be noticed that that case was one which was in relation to the performance of worship of the deity of a temple in a particular manner. But the present case, as I have pointed out, is entirely different, in that the reference to the temple is wholly incidental and the act of breaking the coconut is not an exclusive right claimed generally in relation to worship in the temple but exclusively in connection with the starting of the bull race The entire claim is really one which is dissociated with the worship at the temple as the principal feature of the claim. It seems to me that the claim of the plaintiff which is merely that he is entitled to run the customary bull race during the month of Thai-Masi and that no one has that right is a right of a civil nature and the suit is cognisable under section 9, Civil Procedure Code.

The decree of the Court below is accordingly reversed and the suit will stand decreed. The plaintiff will get his costs in all the Courts from the contesting defendants.

No leave.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE N KRISHNASWAMY REDDY.

K. T. Kosalram and others *Appellants**

Imports and Exports (Control) Act (XVIII of 1947), section 5 and Imports Control Order, 1955, Clause 5 —Conditions of license under—Condition (c)—Scope of—Raw materials or accessories—If would include whole machinery

Words and Phrases—Accessories—What are

The term 'accessory' has been defined as equipment usually removable, replaceable, for convenience, safety or completeness The words 'accessories' and 'parts' are used in contra-distinction

1. (1916) 31 M L J. 758.

* Crl A. Nos 34 to 38 of 1965, and Crl.R.C. No 364 of 1965. 5th January, 1967.

with the word 'machinery'. Hence a printing machinery cannot be called an accessory for the publication of a newspaper

What Condition (c) of the conditions of an import licence issued to an importer under the Imports Control Order, 1955 requires is that the goods imported under the actual user's license will be utilised only for consumption as raw materials or accessories in the license holder's factory and that no portion thereof will be sold or permitted to be utilised by any other party This prohibition relates only to raw materials or accessory and not to a printing machinery as such Printing machinery will not come under raw material or accessory within the scope of the condition and hence the sale of such machinery imported under an actual user's license will not amount to contravention of the condition.

Crl. A. Nos 34 *to* 38 *of* 1965.—Appeals against the Judgment of the Chief Presidency Magistrate of the Court of Presidency Magistrate, Egmore, Madras, in Case No 2180 of the calendar for 1964

Crl R C No. 364 *of* 1965 —Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the Judgment of the Chief Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, in C C No 2180 of 1964

V K. Thiruvenkatachari for *G Gopalaswami, V. Gopinathan, R. Kamesh, S. K. Rajavelu, R Nadanasabhapathy, R Ganesan* and *S G. Subramaniam,* for Appellants in Crl A. Nos. 34 to 38 of 1965.

G. Gopalaswami, V. Gopinathan, R. Kamesh, S K. Rajavelu, R Nadanasabhapathy, R Ganesan and *S. G. Subramaniam,* for Respondents in Crl. R. C. No. 364 of 1965.

The Public Prosecutor, for the State in Crl.A. Nos. 34 to 38 of 1965 and the Petitioner in Crl.R.C No 364 of 1965.

The Court delivered the following

JUDGMENT —The appellants have been convicted by the Chief Presidency Magistrate, Madras, under section 5 of the Imports and Exports (Control) Act, 1947 read with clause 5 of the Imports (Control) Order, 1955 and under section 120-B of the Indian Penal Code, read with the above sections. The first accused has been sentenced under section 120-B to undergo rigorous imprisonment for six months and under section 5 of the Imports and Exports (Control) Act, 1947 read with clause 5 of the Imports (Control) Order, 1955 to undergo rigorous imprisonment for six months and to pay a fine of Rs. 2,000 and in default to rigorous imprisonment for three months, the sentences to run concurrently.

Accused 2, 3 and 5 have been sentenced to pay each a fine of Rs 1,000 under section 120-B of the Indian Penal Code and section 5 of the Imports and Exports (Control) Act, 1947 read with clause 5 of the Imports (Control) Order, 1955 under each of the two counts and in default to undergo rigorous imprisonment for three months under each count The fourth accused has been sentenced to pay a fine of Rs. 2,000 under section 120-B, Indian Penal Code and a further sentence of fine of Rs. 2,000 under section 5 of the Imports and Exports (Control) Act, 1947 read with clause (5) of the Imports (Control) Order, 1955 The revision petition has been filed by the State for the enhancement of the sentence.

It is sufficient to state the facts briefly which will be relevant for deciding the issues raised in these appeals, as the scope of controversy is very much limited before me. The fourth accused Messrs Dina Seithi Ltd., is a public limited company of which the first accused was the director in charge of the administration and management. The second accused, the brother of the first accused, is one of the directors of Messrs Dina Seithi Ltd The third accused was the Manager of Messrs. Mohan Ram Press, the Printers for the fourth accused The wife of the first accused, Srimathi Gomathi Devi was the sole proprietrix of Messrs. Mohan Ram Press The fifth accused was a broker engaged in the negotiations for purchases and sales of printing machines

The first accused as director in charge of Dina Seithi Ltd , applied for the issue of an import licence on behalf of the fourth accused on 5th May, 1960, for the import of a printing machine valued at Rupees three lakhs under the category of

"actual users" on the ground that the printing machine was required for the development of newspaper industry. On the recommendation by the Committee consisting of the Secretary, Ministry of Commerce and Industry, Registrar of Presses and Controller of Imports and Exports, a licence was granted on 21st September, 1960 (Exhibit P-12) in the name of the fourth accused for importing one rotary press to the value of Rs 1,50,000. On a further request made by the first accused on behalf of the fourth accused, to enhance the value to Rupees three lakhs the enhancement was approved by the Chief Controller and the period of the validity of the licence was also extended by six months. On 2nd July, 1961, the first accused made the application requesting for permission to import two rotary machines of the value of Rupees three lakhs under the import licence granted to him (Exhibit P-12) on the ground that one more press was required for his office at Madurai. The Chief Controller permitted the accused to import two printing machines.

The first accused arranged with Messrs. Universal Printing Equipment Co, New York, U S.A, for importing a secondhand rotary press, it arrived on 17th February, 1962, at the Madras Harbour which was taken delivery of by the fifth accused under instructions from the first accused. In the meanwhile, there were negotiations for the sale of the machinery through the fifth accused, the broker, and ultimately the printing machine imported by the first accused was sold to P.W. 16, George Thomas of Kottayam, for a sum of Rs 2,16,700 It is not necessary to note the details of the correspondence and negotiations resulting in the sale of machinery to P W. 16 as the sale is not disputed before me. The appellants were prosecuted for the contravention of the condition of the licence, Exhibit P-12 granted to the fourth accused and also for having conspired to comit an illegal act namely contravening the condition of the licence Exhibit P-12 by selling the printing machinery to P.W 16.

Several contentions were raised before the learned Chief Presidency Magistrate on behalf of the accused and though the same contentions were reiterated in the Memorandum of Grounds filed in these appeals, the learned Counsel appearing for the appellants, Sri V K Thiruvenkatachari, confined himself mainly to the fact that Condition (*c*) of the licence issued to accused 4 (Exhibit P-12) was only with reference to raw materials or accessories and that as such the sale of the printing press, even if true, cannot be said to be in contravention of the said Condition (*c*). The factum of sale of the printing press to P.W.16 is not disputed. For appreciating the contention of the learned Counsel for the appellants relating to the purport and effect of the contravention of Condition (*c*) of the licence Exhibit P-12 it is necessary to note briefly the ingredients of the offence under section 5 of the Imports and Exports (Control) Act, 1947, and also the procedure relating to the grant of licence Under the scheme of the Imports and Exports (Control) Act, 1947 (hereinafter called the Act), power is conferred on the Central Government by virtue of section 3, to make provisions for prohibiting, restricting or otherwise controlling the import and export of goods of any specified description. Section 5 of the said Act prescribes penalty for contravention of an order made by the Central Government under section 3 thereof Section 5, as amended by Act IV of 1960, is in the following terms.

"If any person contravenes or attempts to contravene, or abets a contravention of any order made or deemed to have been made under this Act or any condition of a licence granted under any such order, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act 1870, as applied by sub-section (2) of section 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both."

In exercise of the powers conferred on the Central Government, by virtue of section 3 of the Act, the Central Government issued an order called the Imports (Control) Order, 1955 (hereinafter called the Order), by a notification dated 7th December, 1955, which repealed the earlier Orders and the relevant provisions of rule 5 of the said Order are as follows.

"Rule 5. *Conditions of licence*—(1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below.

(i) that the goods covered by the licence shall not be disposed of, except in the manner prescribed by the licensing authority, or otherwise dealt with without the written permission of the licensing authority or any person duly authorised by it,

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any directions attached to the licence,

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted

(2) * * * * * *

(3) It shall be deemed to be a condition of every such licence, that —

(i) no person shall transfer and no person shall acquire by transfer any licence issued by the licensing authority except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority

(ii) * * * * * *

(iii) * * * * * *

(4) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause "

In the present case, by virtue of sub-clause (1) of clause 5 of the Order, the licensing authority issued the licence Exhibit P-12 attaching conditions to it, one of the conditions being Condition (*c*). There is no doubt that by virtue of sub-clause (4) of clause 5 of the Order, all the conditions imposed by the licensing authority must be complied with by the licensee. Contravention of any of the conditions imposed by the licence will be a contravention of the Order, which is punishable under section 5 of the Act These provisions have statutory force.

Before dealing with the contentions raised by the learned Counsel for the appellants, it is also necessary to note briefly the procedure followed by the licensing authority in granting the licence. For this purpose, the Central Government issued certain administrative instructions to be followed by the licensing authority, for their guidance. These instructions relate to grant of import licences to three categories of persons, namely, (1) Established Importers, (2) Actual users, and (3) New-comers In the present appeals we are concerned with "Actual Users". The term "Actual Users" is defined in the Red Book relating to April-September, 1960, as those who require raw materials or accessories for use in an industrial manufacturing process. In the same book, the items licensable to Actual Users have been indicated in the proper column in section II and a consolidated list of these items is given in Appendix IV. It appears that besides Actual Users, who require raw materials and accessories, as defined in the Red Book, persons, who require certain commodities indicated in that book, can also apply in the form prescribed for applications be Actual Users : *vide* Appendix VI. A licence for the import of printing machinery for newspaper establishments and quality printers for the purpose of replacement or development purposes can be applied under the Actual User's application form as indicated in item 67 (1) (i) of section II of the said Red Book The first appellant on behalf of the fourth appellant applied for a licence for import of printing machinery for the purpose of development of newspaper industry and that application was made in the form prescribed for Actual Users, and the licence was also granted for the said import in the form intended for Actual Users. The said licence is in printed form. The relevant condition attached to the licence, which is alleged to have been contravened in this case, is in the following terms :

"(*c*) The goods will be utilised only for consumption as raw materials or accessories in the licence-holders' factory and that no portion thereof will be sold to or be permitted to be utilised by any other party or pledged with any financier other than Banks authorised to deal in foreign exchange provided that particulars of goods so pledged are reported in advance to the licensing authority "

It is contended for the appellants that the printing press imported in this case is neither raw material nor accessory, as mentioned in condition (*c*) and that this condition refers to Acual Users, as defined in the Red Book relating to April-September, 1960, namely, persons who require raw materials or accessories for use in an industrial manufacturing process. Hence, this condition cannot apply to printing machinery. Though this contention seems to be somewhat technical at the outset it

has its force with reference to the nature of the offence, namely, contravention of the conditions imposed by the licence. Contravention of the conditions of the licence is the crux of the offence. It has therefore to be carefully examined whether condition (*c*) mentioned in Exhibit P-12 will relate to printing machinery also. A reading of the terms of the said condition makes it clear that the goods to which they refer are raw materials or accessories. The said condition begins: "the goods will be utilised for consumption as raw materials or accessories in the licence-holders' factory", thereby meaning that the raw materials or accessories imported or covered by the licence Exhibit P-12 must be utilised for consumption as such in the licence-holders' factory, emphasis being laid more on the place and the manner in which the raw materials or accessories are to be used. The second clause of that condition is that such goods, namely, raw materials or accessories, or portion thereof, shall not be sold, etc., etc. This, in my view, undoubtedly refers to raw materials or accessories, consistent with the definition of "actual users" who require raw materials or accessories

On behalf of the prosecution it was contended that the goods referred to in condition (*c*) of Exhibit P-12 should be taken as goods covered by Exhibit P-12, namely, printing machinery and that it must be read disjunctively, relating to the second clause of condition (*c*). But I am of opinion that there is no reason to read the second clause of condition (*c*) disjunctively from the first clause thereof. If the contention put forward by the prosecution is accepted, the first clause of the condition will have no meaning, as it has to be read, according to the prosecution, as meaning that the goods (printing machinery) will be utilised only for consumption as raw material or accessories in the licence-holders' factory. If read in this manner, printing machinery must be deemed to be raw materials or accessories, by fiction. I do not think that that was the intention of the licensing authority in imposing this condition. It is not proper to read into the condition something which is not meant by it.

The next point to be considered is, whether printing machinery can be classified as raw materials or accessories, to bring it under condition (*c*) The learned Chief Presidency Magistrate held that the printing press was an accessory for the publication of the newspaper and that condition (*c*) applied to the printing press covered by the licence Exhibit P-12. In my opinion, printing press cannot be classified as an "accessory" for the publication of the newspaper. In Webster's New World Dictionary, "accessory" has been defined as equipment usually removable, replaceable for convenience, safety or completeness, as accessories of an automobile. In *Armstrong, Mitchell & Co* v. *The Hotchkiss Ordnance Company*[1], it was held that *parts* of the gun were not accessories to the gun In the Red Book relating to April-September, 1960, in several places the terms "accessories" and "parts" are used in contra-distinction with machinery:

Page in the Red Book.	*Part*	*Item No.*
117	II	39 (*b*)
118	II	39 (*c*)
144	III	5 (*k*)
222	IV	295, 297, 299 & 301
232	IV	313
286	V	70, 299
301	V	78
306	V	82
307	V	86

Even in item No. 67 (1) (i) of section II of the said Red Book, printing machinery is not described as raw material or accessory, but indication is given therein that actual user's licence can be obtained if the machinery is required for replacement or development purposes. The learned Public Prosecutor is unable to support the finding of the learned Chief Presidency Magistrate that printing machinery is an "acces-

1. 13 T L.R. 188.

sory ". However, he faintly suggested that it will be " raw material " in relation to the newspaper industry. Raw material, as commonly understood, is used in the process of manufacture. Printing machinery will certainly not come under the category of " raw material ". When it is not established that printing machinery is " raw material " or " accessory ", condition (*c*) of Exhibit P-12 will not apply to it. To sustain a conviction for the offence, namely, contravention of the conditions of the licence, the condition must be clear, specific and unambiguous. If there is a reasonable doubt relating to the nature of the condition imposed, the benefit of the doubt will have to be given to the accused.

In this context it is very significant to note that in 1964 machinery and spare parts were added to the definition of " actual users " by an amendment and consistently therewith the wording of the conditions also was changed in the licences issued thereafter. Condition (*c*) in the new licence issued, which has been produced before me by the learned Counsel for the appellants, is as follows :

" All items of goods imported under it shall be used only in the licence-holders' factory and no portion thereof will be sold to or be permitted to be utilised by any other party. "

Apparently, experiencing difficulty in classifying " machinery " and "spare parts" under the category of raw materials or accessories, the amendment appears to have been brought about in 1964. This amendment and change in the conditions of the licence, as mentioned above, add strength to the contention of the learned Counsel for the appellants.

The learned Public Prosecutor relied upon two decisions of the Supreme Court (1) *Abdul Aziz* v. *State of Maharashtra*[1], and (2) *State of West Bengal* v. *Motilal*[2]. In the first case a permit was obtained for the import of certain quantity of art silk yarn and a condition similar to condition (*c*) in Exhibit P-12, that the goods would be utilised only for consumption as raw material or accessories in the licence-holders' factory and that no portion thereof would be sold to anybody, was imposed. The Supreme Court held that a sale of a portion of that yarn was in violation of the said condition. This decision is not of any help to the prosecution, because what was imported, namely, art silk yarn, was a raw material, and the condition of the licence therein referred to raw material. The sale of the art silk yarn was clearly a violation of the condition of the licence. In the second case, it is no doubt true that what was imported was machinery under the actual user's licence. Item 7 of the licence issued stated that the applicant will use the machinery for his own use. No condition similar to condition (*c*) in Exhibit P-12 was imposed in that case, obviously because machinery could not be treated as raw material or accessory. In Exhibit P-12 there is no condition similar to the one mentioned in item 7 of the licence in that case. Their Lordships have held that there was a contravention of clause 5 of the Order, 1955, on the ground that the licence created its own condition that the goods (machinery) should be used by the licensee, thereby meaning the machinery. They further observed that when the goods were sold, condition in column No. 7 was broken and that would be a breach of the Order, 1955, which had come into force. This decision also is not of help to the prosecution.

I have already held that condition (*c*) in Exhibit P-12 which is alleged to have been contravened by the appellants, cannot be made applicable to printing press, but it is a general condition printed in the licence form consistent with the definition of " actual users ", before the amendment of that term in 1964. The licensing authority in this case has not applied its mind, when granting the licence for importing printing machinery by the first accused, imposing condition (*c*) in Exhibit P-12. The lacuna was probably discovered subsequently, as seen from the licence issued later, where the condition is properly worded.

I therefore hold, for the reasons mentioned above, that the prosecution has not proved the offence against the appellants beyond reasonable doubt.

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1. (1964) 2 S C J 128 : (1964) M L J. (Crl.) 368 : A.I.R. 1963 S.C. 1470.
2. A.I.R. 1966 S.C. 1586.

On the view I am taking that no offence has been made out against the accused, it is not necessary for me to consider the charge relating to conspiracy.

In the result, the appeals are allowed and the appellants are acquitted. The bail bond of accused 1 will stand cancelled. The fine amounts, if paid, will be refunded.

Crl.R.C. No. 364 of 1965 filed by the State for enhancement of sentence is dismissed.

R.M. ——— *Appeals allowed; Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

P. T Murugesa Mudaliar . *Petitioner**

v.

K. M. Ramachandran and others . *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 101—*Magistrate acting under—Nature of function—If a Court—Orders if revisable under Criminal Procedure Code.*

Criminal Procedure Code (V of 1898), *sections* 435 *and* 439—*Revisional jurisdiction under—If would apply to orders of Magistrates acting as* persona designata *under special enactments.*

A Magistrate exercising powers under section 101 of the Madras Hindu Religious and Charitable Endowments Act, 1959 is no doubt discharging his functions judicially and the proceedings before him are judicial proceedings It cannot be said that such functions are either ministerial or executive. The proceedings under the section are of a civil nature and not criminal. A Magistrate exercising powers under the section, though judicial in character, is acting as *persona designata* and not as a Court, much less an inferior criminal Court whose orders are revisable under sections 435 and 439 of the Criminal Procedure Code.

The jurisdiction under sections 435 and 439 of the Criminal Procedure Code cannot be invoked in case of orders made by a Magistrate as *persona designata*, and not a Court, under special powers conferred by specific statutes

Case-law referred

Dargah Committee v *State of Rajasthan,* (1962) 1 S.C J 583, Foll

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Fifth Presidency Magistrate of the Court of Presidency Magistrate, Egmore, Madras, dated 30th September, 1965 and made in M.P. No. 308 of 1965, etc.

P. N. Venugopalan, for Petitioner and *A.S. Natarajan,* for Respondents in Crl. R.C. No. 1270 of 1965.

T. R Srinivasan, for Petitioner and *K. S. Naidu,* for Respondent in Crl. R.C. No. 1306 of 1966.

R. N. Kothandaraman, for Petitioner in Crl. R.C. No 1337 of 1965; Respondent not appearing.

G. Gopalaswami, for Petitioner and *K Raman,* for Respondents 3, 4, 5, 7, 10, 13 to 15 in Crl R.C. No. 90 of 1966.

T. Rangaswami Ayyangar, for Petitioner and *R. Sundaralingam,* for Respondent in Crl.R C. No 222 of 1966.

R. Sundaralingam, for Petitioner in Crl.R.C. No 310 of 1966; Respondent not appearing.

T. M. Chinnayya Pillai, for Petitioner and *R. Sundaralingam,* for Respondent in Crl.R.C. No. 559 of 1966.

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* Crl R.C Nos 1270 of 1965, 1306 of 1966, 1337 of 1965, 90 of 1966, 222 of 1966, 310 of 1966, 559 of 1966, 564 of 1966 and 1015 of 1966
Crl R.P Nos 1247 of 1965, 1278 of 1966, 1313 of 1965, 89 of 1966, 219 of 1966, 306 of 1966, 552 of 1966, 557 of 1966 and 996 of 1966.

6th January, 1967.

S. Mohan, for Petitioner and *T. M. Chinnayya Pillai*, for Respondents in Crl.R.C. No. 564 of 1966.

R. Sundaralingam, for Petitioner and *U. Somasundaram*, for 1st Respondent in Crl.R C. No 1015 of 1966.

S R. Srinivasan, for Public Prosecutor, for State.

The Court made the following

ORDER —These petitions have been filed under sections 435 and 439 of the Code of Criminal Procedure against the order of the Fifth Presidency Magistrate, directing delivery of the properties to the respondents appointed as trustees by the Deputy Commissioner of the Hindu Religious and Charitable Endowments under section 101 of the Hindu Religious and Charitable Endowments Act (hereinafter to be called as the Act). A preliminary objection is taken by the respondents to the maintainability of these petitions on the ground that the First Class Magistrate is not an inferior Criminal Court within the purview of the provisions of sections 435 and 439 of the Code of Criminal Procedure and that the functions exercised by him are under section 101 of the Act either ministerial or executive functions and that he does not act in a judicial capacity, and at any rate he exercises his jurisdiction as *persona designata* On the other hand, the learned Counsel for the petitioner Sri P N. Venugopalan in Criminal R C No 1270 of 1965 contended that the Magistrate exercising his functions under section 101 of the Act is a judicial officer exercising functions as a Magistrate and that he is amenable to the revisional jurisdiction as contemplated under sections 435 and 439 of the Code of Criminal Procedure.

To appreciate the points involved in these revision petitions, it is necessary to set out the relevant provisions of section 101 of the Hindu Religious and Charitable Endowments Act.

" *Section* 101

(1) Where a person has been appointed

(*a*) as trustee or executive officer of religious institution, or

(*b*) to discharge the functions of a trustee of a religious institution in accordance with the provisions of this Act in any scheme framed by the Board before the 30th September, 1951 and such person is resisted in or prevented from,obtaining possession of the religious institution or of the records,accounts and properties thereof, by a trustee, office-holder or servant of the religious institution who has been dismissed or suspended from his office or is otherwise not entitled to be in possession or by any person claiming or deriving title from such trustee, office-holder or servant, not being a person claiming in good faith to be in possession on his own account or on account of some person not being such trustee, office-holder or servant, any Presidency Magistrate or any Magistrate of the First Class in whose jurisdiction such institution or property is situated shall, on application by the person so appointed, and on the production of the order of appointment and where the application is for possession of property, of a certificate by the Commissioner in the prescribed form setting forth that the property in question belongs to the religious institution, direct delivery to the person appointed as aforesaid of the possession of such religious institution, or the records, accounts and properties thereof, as the case may be."

This provision corresponds to section 87 of the Hindu Religious and Charitable Endowments Act of 1951 which is *in pari materia* with section 101 of the Act.

The material points, that arise for consideration, in the light of the provisions of section 101 of the Act relevant for the purpose of decision in these petitions, are as follows :—

(1) Any Presidency Magistrate or any Magistrate of the First Class having territorial jurisdiction where the properties are to be delivered is empowered to deal with, under this section ;

(2) that such Magistrate can direct delivery of the possession of religious institution, records and accounts and properties thereof as the case may be after complying with the following conditions mentioned therein :

(*a*) on the production of the order of appointment by the Commissioner ;

(*b*) on the production of the certificate issued by the Commissioner in the prescribed form setting forth that the property in question belongs to the religious institution ;

(*c*) that the applicant was resisted in or prevented from obtaining possession of the religious institution or properties thereof by a trustee, office-holder or servant of the religious institution who has been dismissed or suspended from the office or is otherwise not entitled to be in possession, and

(*d*) that such applicant was resisted in or prevented from taking possession of the properties by any person claiming title from such trustee, office-holder or servant not being a person claiming in good faith to be in possession on his own account or on account of some person not being such trustee, etc

It is clear from this section that the Magistrate has to decide on the issues whether the order of appointment, and certificates produced by the applicants are true and genuine, whether the persons who offer resistance to the trustee appointed by the Commissioner taking delivery of the property have title of their own to continue in possession and whether the claim in that behalf is in good faith. Before coming to a decision on the issues, the Magistrate has to hold an enquiry into the matter. He has to issue notice to the parties who may be affected by his order. In doing so the Magistrate is discharging his functions judicially and the proceedings before him are judicial proceedings It cannot be said that the functions exercised by the Magistrate under section 101 of the Act are either ministerial or executive

On this point Mr P. N. Venugopalan besides citing several decisions, mainly relied upon two decisions *Prattipathi Dandaiah* v *Venkatarama Dikshitulu*[1], and *B. Krishna* v *D Chenchi Reddy*[2] These two decisions dealt with section 87 of the Hindu Religious and Charitable Endowments Act of 1951 which as already stated in *in pari materia* with section 101 of the Act In the earlier decision Subba Rao, J, as he then was on behalf of the Division Bench expressed in the following terms relating to the functions of a Magistrate exercising powers under the provisions of section 87 of the Act of 1951 :

" A Magistrate is a judicial officer and the Legislature must be presumed to know that he follows the rules of judicial procedure Before a Magistrate can direct delivery of possession of property under section 87 of Madras Act (XIX of 1951) he should issue notice to the party affected An order made by a Magistrate without issuing notice to the archaka or the tenants claiming under him is bad because it offends the fundamental principles of natural justice "

I respectfully agree with the abovementioned observations and I am certainly bound by them. In the latter decision, Chandra Reddy, J, as he then was, speaking on behalf of the Bench on this point, agreed with the observations made by Subba Rao, J., as he then was and stated that the proceedings under section 87 of the Act of 1951 before the Magistrate were judicial in character as he has to hold an enquiry into the matter before reaching a conclusion It is therefore clear that the proceedings before the Magistrate under section 101 of the Act are undoubtedly judicial proceedings.

The next important point to be considered is whether the Magistrate exercising powers under section 101 of the Act is a Court or *persona designata* If the Magistrate is found to be a Court, then there is no difficulty in holding that it is an inferior criminal Court within the purview of sections 435 and 439 of the Code of Criminal Procedure On this point also the learned Counsel, Mr P N. Venugopalan cited several authorities mainly relying upon *B. Krishna* v *D Chenchi Reddy*[2], which I had already mentioned in connection with another point in the previous paragraph. Chandra Reddy, J, as he then was in reversing the judgment of a single Judge reported in *Anjayya* v *Venkateswara Das Bavaji*[3] held that the Magistrate exercising powers under section 87 of the Act of 1951 is a Court and not a *persona designata* The learned Judge based his conclusion mainly on the ground that the Magistrate exercises a judicial function and that additional duties are entrusted to him as is enlarged, quite dissimilar to the situation where an officer is constituted as special authority. I do not think that it is necessary to go into the details of the discussion relating to

1. (1953) 2 M.L J 550. (Crl) 230 A I R 1959 A P 129
2 (1959) 1 An W R 265 (1959) M.L J. 3 (1958) 1 An W R 263

this point in the said decision on the view that I am taking in the light of the decision of the Supreme Court reported in *Dargah Committee* v. *State of Rajasthan*[1].

The Supreme Court held that the Magistrate entertaining an application and holding an enquiry under section 234 of the Ajmer-Merwara Municipalities Regulation (VI of 1925) does so as a "*persona designata*" and not as a Magistrate functioning and exercising his authority under the Code of Criminal Procedure irrespective of the fact whatever may be the character of the proceedings whether it is purely ministerial or judicial or quasi-judicial. Section 234 of the said Regulation provides *inter alia* that any tax claimable or recoverable by this Act after a demand has been made therefor in the manner prescribed by rule can be recovered on an *application to a Magistrate having jurisdiction within the* limits of the Municipality or in any other place where the person by whom the amount is payable may for the time being reside, by the distress and sale of movable properties within the limits of such Magistrate's jurisdiction belonging to such person. The power to direct the recovery of the tax by sale of any movable property by distress and sale is conferred on a Magistrate having territorial jurisdiction. Similarly under section 101 of the Act the power to direct delivery of the properties is conferred on a First Class Magistrate having territorial jurisdiction namely where such properties are situate. Both these provisions do not confer powers on a Court Powers are conferred by the respective enactments on the Magistrates for limited purposes. It is no doubt true that the Supreme Court has said that the nature of enquiry contemplated by section 234 of the Ajmer-Merwara Municipalities Regulation (VI of 1925) partakes of the character of ministerial enquiry rather than the judicial enquiry. But it has been laid down as a statement of law, the following principle, in unequivocal terms which, with great respect, I am of the view applies to the present revision petitions :

> "Now looking at section 234 that the proceedings initiated before a Magistrate are no more than recovery proceedings .. . . In any event it is difficult to hold that the Magistrate who entertains the application is an inferior criminal Court The claim made before him is for the recovery of a tax and the order prayed for is for the recovery of the tax by distress and sale of the movable property of the defaulter If at all, this would at best be a proceeding of a civil nature and not criminal. That is why we think, whatever may be the character of the proceedings, whether it is purely ministerial or judicial or quasi-judicial, the Magistrate who entertains the application and holds the enquiry does so because he is designated in that behalf and so he must be treated as a *persona designata* and not as a Magistrate functioning and exercising his authority under the Code of Criminal Procedure. He cannot therefore be regarded as an inferior criminal Court."

The proceedings under section 101 of the Act directing delivery of the properties are in my view of civil nature and not criminal, as the recovery of tax by distress and sale of movable properties are found to be civil proceedings and not criminal. I therefore hold that the Magistrate exercising powers under section 101 of the Act which though judicial in character, is *persona designata* and not a Court much less inferior criminal Court. On this preliminary point, I find that these petitions under sections 435 and 439 of the Code of Criminal Procedure are not maintainable. It is therefore not necessary to decide either on merits or any other point of law raised in the petitions. The petitions are dismissed.

The petitioners, if so advised, may file petitions under section 227 of the Constitution.

R.M. *Petitions dismissed.*

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1. (1962) 1 S.C.J. 583.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S RAMAMURTI

P. N. Kailasanatha Mudaliar and others .. *Appellants**

v.

P. Viswanatha Mudaliar and another . *Respondents*

Presidency Towns Insolvency Act (III of 1909), section 17—Sale by Official Assignee purporting to convey "all right, title, interest and claim of insolvent"—Extent of property conveyed—If includes share of the sons of insolvent over which insolvent had power of disposal

Co-owner—Alienation by, to stranger and adverse possession

In the case of the Official Assignee governed by the Presidency Towns Insolvency Act it is undoubted law that under the Act what vests in the Official Assignee is the share of the insolvent (Hindu) as well as the power of disposal over the sons' share, regarding it also as property. Where therefore the Official Assignee by a sale deed sells the insolvent's property purporting to convey "all the right, title, interest and claim of the insolvent" it cannot be said that the Official Assignee conveyed only the share of the insolvent and not that of his sons over which he had a disposing power The argument that unless the Official Assignee had in the sale deed expressly and specifically stated that in addition to conveying the share of the insolvent, the Official Assignee was also exercising the power of sale over the sons' share and by virtue of that power the sons' share also was being conveyed to the purchaser, the title conveyed under the sale deed must be confined and restricted only to the share of the insolvent father, is untenable. So long as there is no exclusion of the share of the sons the sale of the entire property as such described in the sale certificate would be sufficient to convey the entire property.

Case-law discussed.

Though the mere fact that one co-owner is in possession of the entire property would not be sufficient evidence of ouster so as to extinguish the rights of the other co-owners, this principle will have no application in a case where a co-owner alienates the property to a stranger Thus while possession of one co-owner is in itself rightful and does not imply hostility, the position is different when an alienee-stranger is in possession and his possession itself indicates that it is adverse to the true owners

Appeal against the Decree of the Court of the Subordinate Judge, Chingleput, in Appeal Suit No. 178 of 1963, preferred against the Decree of the Court of the District Munsif of Poonamallee in Original Suit No. 521 of 1961

T. T. Srinivasan and *A. N. Rangaswami*, for Appellants.

R. S. Venkatachari and *S. Harihara Ramachandran*, for Respondents.

The Court delivered the following

JUDGMENT.—This is a thoroughly hopeless Second Appeal totally devoid of substance. One Suryaprakasam had two sons, Swaminatha and Ayyaswami. This Suryaprakasam was adjudged insolvent in I.P. No. 126 of 1922 and Swaminatha in I.P. No. 109 of 1926 both on the file of this Court. Plaintiffs 1 to 5 and the second defendant are the sons of Swaminatha. The Official Assignee under the sale deed, Exhibit B-1, dated 10th February, 1928, sold two-third share (what precisely is sold is in dispute)in the suit property, which is door numbers 8 and 9, Anjaneya Koil Street, Poonamallee, to the first defendant for a sum of Rs. 2,500. Later on the first defendant under the sale deed, Exhibit B-8, dated 20th October, 1930, purchased Ayyaswami's one-third share in the house for a sum of Rs. 1,250 with the result that the first defendant claims that he has become the owner of the entire house. The first defendant is the son-in-law of Suryaprakasam, having married his daughter.

The five plaintiffs have filed the present suit in the year 1961 for partition and separate possession of their 5/21 share on the ground that under the sale in the insolvency the Official Assignee must be held to have sold only the one-seventh share of the insolvent, Swaminatha (the plaintiffs' father). The plaintiffs' further case is that during all this time their father Swaminatha was also in possession of the suit property in recognition of the plaintiffs' rights, this circumstance being relied upon to save the suit from the bar of limitation.

The first defendant, the purchaser from the Official Assignee, is resisting the suit on the ground that what the Official Assignee purported to sell and actually

*S A No. 544 of 1965. 28th October, 1966.

sold and what was actually purchased by the first defendant is a two-third share in the house under Exhibit B-1, thereby meaning the one-third share of Suryaprakasam, plus Swaminatha's one-seventh share as well as the shares of his sons by virtue of the power of disposal of Swaminatha over the shares of his sons exercised by the Official Assignee under the sale deed. His further case is that immediately after the execution of Exhibits B-1 and B-2 he obtained possession of the property, the entire house, that he has been in possession throughout from 1929 in his own right, and that whatever rights the plaintiffs or any other member of the family may have, have been extinguished by ouster and adverse possession The first defendant also urged that the plaintiffs came to occupy the portion of the suit property as a tenant under the first defendant, that later on, misunderstandings arose between them, which resulted in the present suit for partition by the plaintiffs.

The trial Court on a consideration of all the facts of the case came to the conclusion that what the Official Assignee purported to sell and actually sold was a two-third share in the house which took in the shares of the plaintiffs as well It also held that after the purchase by the first defendant he has been in possession of the property in his own right from 1929 excluding all the members of the family, and that the plaintiffs' rights were therefore barred by limitation. On appeal, this judgment of the trial Court was affirmed, the appellate Court taking the view that under the two sale deeds by the Official Assignee the first defendant had purchased the entire house, including the shares of the plaintiffs. In this view that the plaintiffs have no subsisting title, the lower appellate Court did not express any opinion regarding the question of limitation Hence the present Second Appeal by the defeated plaintiffs.

Learned Counsel for the appellants urged that on a proper interpretation of Exhibit B-1, the sale deed executed by the Official Assignee, the shares of the plaintiffs, 5/21, had not passed to the first defendant In support of his contention learned Counsel placed considerable reliance upon the decision of Satyanarayana Rao, J , in *Thirumaleshwara Bhatta* v *Govinda Bhatta*[1]. Before I refer to this decision it is necessary to mention a few facts. When the Official Assignee applied for permission to sell the suit property he wanted permission to sell the house as a whole, including the share of the son, Ayyaswami (the non-insolvent) on the ground that the debts were all incurred by Suryaprakasa and Swaminatha for the maintenance of the family and were binding upon the joint family comprising the father and the two sons, but ultimately the Court passed the order authorising the Official Assignee to sell the shares of the father and the son, the insolvents, excluding the shares of the non-insolvent son. I am referring to this at the threshold to indicate that what was proposed to be sold by the Official Assignee was the entire property and not the shares of the insolvents alone If the Official Assignee intended to sell the shares of the insolvents alone there was no question of his seeking permission to sell the share of the non-insolvent son, Nallathambi Ayyaswami. It is clear therefore that when Ayyaswami's share was excluded what was proposed to be sold and what was authorised to be sold was the specific two-third share in the entire house, and that is what the purchaser bargained for. There is the further fact that this property along with the other properties was subject to an encumbrance in favour of a mortgagee, it was discharged at the time when the sale deed came to be executed by the Official Assignee, here again the object being that the property which is sold by the Official Assignee should be free from the claims of the mortgagee. This again emphasises that what was proposed to be sold and what was bargained to be purchased is the two-third share.

The next circumstance to be borne in mind is that the price for the one-third share is Rs 1,250 and the price for the two-third share is Rs 2,500 Having regard to the fact that Exhibit B-1 is earlier than B-8 in point of time and that the purchaser was exposed to a suit for partition and other incidental litigation, as against

1. (1952) 1 M.L.J. 681.

Ayyaswami who owned at that time one-third share, inevitable in insolvency proceedings, the price of Rs. 2,500 was a proper price for the purchase of the two-third share in the house The price paid is not so ludicrously low or inadequate as to suggest that what was sold was only the one-seventh share of Swaminatha, excluding the shares of the plaintiffs.

Reference may now be made to the relevant portion in the sale-deed which runs as follows :—

" . whereas the house and ground described hereunder is now free from any encumbrance whatsoever and whereas the insolvent and P N Nallathambi Ayyaswami Mudaliar are jointly entitled to be the absolute owners of the said house and ground described hereunder and insolvents are possessed (i) of only a two-third share in the said house, (ii) and ground described below and whereas the purchaser herein offered the sum of Rs 2,500 for the purchase of the said two-third share of the house and ground described hereunder which offer has been accepted by the Official Assignee and was confirmed by his Lordship Mr Justice Kumaraswamy Sastry by an order dated 14th January, 1929, *now this indenture witnesseth* that in pursuance of the above recited agreement and in consideration of the sum of Rs 2,500 the receipt of which sum the vendor herein doth hereby acknowledge, he the vendor and the other hereby convey, assign and transfer unto the purchaser all the right, title and interest and claim of the said insolvents and the Official Assignee in and to the property described below free from the mortgages effected thereunder together with the house, stables, cow-sheds, wells, coconut trees and etc .

SCHEDULE.

Two-third share in house and ground with stable, cow-sheds including backyard bearing Village Survey No 115-38-39 with wells, coconuts and other trees standing thereon including the ground compound and walls measuring east to west about 300 feet, south to north about 400 feet situate on the southern row of Anjaneyar Koil Street, bounded on the North, etc . . . "

It is unnecessary to refer to the recitals in the second sale-deed Exhibit B-8 and it is sufficient to state that it proceeded on the footing that the purchaser had purchased from the Official Assignee under Exhibit B-1 two-third share in the house, that the purchaser has been put in possession of that two-third share in the house and that under Exhibit B-8 the purchaser was purchasing the remaining one-third share. The important recitals in the sale-deed, Exhibit B-1, extracted above would show that what the Official Assignee conveyed under this sale-deed is two-third share in the house and the interests of the sons of the said Swaminatha, the plaintiffs herein, were not excluded

Learned Counsel for the appellants urged that the language employed in this document, Exhibit B-1 is not sufficient to indicate that the Official Assignee not only sold the share of the insolvent, Swaminatha, but also exercised his power of sale of the shares of the sons of Swaminatha He urged that the expression " all the right, title and interest and claim of the insolvent ", however wide the language may be, would only mean the shares of the insolvent as such and would not take in the power of disposal of the Official Assignee over the shares and the interests of the sons of Swaminatha In substance, his contention is unless the Official Assignee, had, in the sale-deed expressly and specifically stated that in addition to conveying the share of the insolvent, the Official Assignee was also exercising the power of sale over the sons' share, and by virtue of that power the sons' share also was being conveyed to the purchaser, the title conveyed under the sale-deed must be confined and restricted only to the share of the insolvent father The decision in *Thirumaleshwara Bhatta* v *Govinda Bhatta*[1], relied upon by him no doubt to some extent supports his contention. Before I refer to the reasonings in that decision it is necessary to mention that the facts of that case are easily distinguishable from the instant case

In that case, the dispute arose immediately after the sale by the Official Receiver. The learned Judge held that the fact that in the sale list in the preamble it was stated that what was purported to be sold was the entire right possessed by the said insolvent in the immoveable property described in the schedule and the fact that in the schedule the entire property was described was not sufficient to convey the entire

1. (1952) 1 M.L J. 681

property inasmuch as the recitals in the sale-deed showed that what was being conveyed was the property belonging to the insolvent. The learned Judge also took the view that reference in the sale-deed to certain proceedings taken by the Official Receiver to set aside a trust deed executed by the insolvent and his son also showed that what was conveyed was only the insolvent's share The learned Judge wound up by saying that there was no specific language in the deed conveying the interests of the son in the property, nor any other indication in the deed from which such an inference could be drawn It will therefore be noticed that the decision in that case turned upon the particular facts of the case and the particular language employed in the sale-deed in question.

Here the facts and the circumstances under which the Official Assignee executed the sale-deed (referred to earlier) show that the intention of all concerned, including the Court, was to convey a two-third share in the house thereby meaning the shares of the plaintiffs and the second defendant This decision has been noticed not with complete approval in later decisions of this Court and other Courts

It is sufficient to refer to a Bench decision of the Andhra Pradesh High Court in *Perraju* v. *Perraju*[1], the decision of a Bench consisting of Viswanatha Sastri and Krishna Rao, JJ. In that case too it was argued that there must be a specific recital in the sale-deed to the fact that the Official Receiver in addition to selling the share of the insolvent-father was also exercising the power of sale of the father over the sons' shares which also vested in the Official Receiver. The Bench rejected that argument and it was observed as follows at page 611 while referring to the decision of Satyanarayana Rao, J.:

"We are not here concerned with the correctness of the conclusion of the learned Judge on the facts of the particular case All that we respectfully point out is that it is sufficient if the Official Receiver in fact exercises the right of the father to sell the share of the sons and conveys the entire interest in the property to the purchaser The Official Receiver need not purport to "exercise the right to sell the right of the father to sell the son's share as well, whatever this might mean". It is sufficient if he sells the absolute interest in the property. There is no doubt a difference between the existence of a power and its actual exercise and the mere existence of power may not be sufficient to show that in any particular case that it was exercised At the same time the deed of sale executed by the Official Receiver need not specifically recite that he was exercising the power of sale vested in him under sections 28 and 28-A of the Act. It will be sufficient if he purports to convey the entire interest in the property and not merely the share of the insolvent-father In the present case, what has been sold is the right of the insolvent in the property described in the schedule.

...The schedule annexed to the sale-deed clearly describes the property and there is no indication in the document that anything less than the entire property or the property excluding the son's shares was sold It was not only the right but the duty of the Official Receiver to sell the entire property of the insolvent for the benefit of his creditors and where the insolvent's property included the power to sell his sons' shares in respect of the insolvent's antecedent debts not tainted by illegality or immorality it may be presumed that the Official Receiver exercised the right vested in him by law for the benefit of the creditors though the sale-deed does not say so. We have also to take due notice of the fact that at the time of the sale by the Official Receiver, the well understood legal position was that the father could convey the interest of his sons for the discharge of his untainted debts and that the Official Receiver in whom the father's interest vested on his insolvency, had also a similar right. The question in these cases is what was intended and accepted to be sold and actually was sold according to the law understood to be prevailing at the time and not what might have been sold under an alteration in the law as subsequently declared by judicial decisions."

The position in the instant case is *a fortiori*. In the case of the Official Assignee governed by the Presidency Town's Insolvency Act it is undoubted law that under the Act what vests in the Official Assignee is the share of the insolvent as well as the power of disposal over the sons' share, regarding it also as property With respect, I am unable to agree with the view taken in *Thirumaleshwara Bhatta* v. *Govinda Bhatta*[2]. The attention of the learned Judge, Satyanarayana Rao, J., was not drawn to a Bench decision of this Court in *Sankaranarayana Pillai* v. *Rajamani*[3], in which, applying the principle of the leading decision of the Privy Council in *Bijraj Nopani v. Pura Sundary Dasee*[4], it was held that if the sale-deed by the Official

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1 (1956) An W R 586: A I R 1957 A P. 609.
2. (1952) 1 M L J 681
3. (1924) 46 M.L J 314 I.L R (1924) 47 Mad 462.
4 (1914) L R 41 I A 189 27 M.L.J 93: I L R 42 Cal 56 (P C)

Receiver uses the "all estate" clause thereby intending to convey, absolutely the property outright, it must be held that the Official Receiver not only sold the share of the insolvent but also intended to exercise the power of disposal, in which case only the purpose of the sale could be effectuated, namely, conveying the entire property outright to the purchaser. In that Bench decision a father and his minor sons were adjudged insolvents. The Official Receiver sold some property in its entirety. The question arose as to what exactly was conveyed under the sale-deed by the Official Receiver The Bench held that even assuming that the order adjudicating the minor sons as insolvents was wrong, and their shares did not vest in the Official Receiver a sale by the Official Receiver purporting to be of the whole family estate passed to the vendee, the sons' share also, since the Official Receiver who stood in the shoes of the father could have sold the sons' shares also for discharging the debts which were neither illegal nor immoral The recital in the sale-deed in that case too was merely a sale of the property and there was no specific recital (referring to the exercise of the power of sale of the Official Receiver) over the shares of the various persons. It is sufficient to refer to the following observations of Venkatasubba Rao, J., at page 472 :

"In *Byraj Nopani* v *Pura Sundary Dasee*[1], it was held that the title vested in an executor passed under the deed by which he purported to convey all his right and title in the property sold although he did not expressly state in it, that he was conveying the property in his capacity as executor, Their Lordships observe, 'The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance and it is a settled rule that the meaning of a deed is to be decided by the language used, interpreted in its natural sense'."

This principle was also recognised in *Gharib-ulla* v. *Khalak Singh* [2] One of the three brothers constituting an undivided Mitakshara family was a minor, and his mother as his guardian executed the mortgage deed along with the two adult brothers. It was found that the mother was incompetent to act as the minor's guardian but their Lordships held that the mortgage must be considered to be a

"mortgage by the family entered into by its karta and could, so far as the mortgage was found to have been made for the benefit of the family and for legal necessity be enforced against all the members.

The true principle deducible from these cases seems to be this The first question that arises is did the executant purport to pass the whole property? The next question is, was he in a position to validly convey it? If the two questions are answered in the affirmative, the third question arises, is there anything in the deed to repel the presumption that he intended to convey the title he possessed in every capacity? Judged by this test, there can be no doubt that the alienees before us acquired the interest of the fathers as well as of the sons in the properties conveyed by the Official Receiver"

I may also next refer to a Bench decision of this Court in *Muthiah Chettiar* v. *Rayalu Ayyar Nagaswami Ayyar & Co.*[3], the observations at page 551, in which the principle of the decision of the Privy Council in *Byraj Nopani* v *Pura Sundary Dasee*[1], was applied. In that case the managing member of the family executed a mortgage of certain properties describing them as self acquisitions. But it was found that the properties were joint family properties It was argued that as the manager mortgaged the property only in his own individual right and did not purport to represent the family acting as the managing member of the family, the mortgage would not bind the interests of the other members of the family This argument was not accepted in the view that if the actual bargain between the parties was that the mortgagee should get a valid enforceable security over the property sought to be mortgaged, the mortgagee would be entitled to invoke for his aid any other capacity or circumstance which would enable the mortgagor to secure that interest even though there was no express reference to that circumstance or capacity in the deed of mortgage.

At this stage, I may refer to a Bench decision of this Court consisting of Satyanarayana Rao and Balakrishna Aiyar, JJ., in *Sreenivasan* v. *Rangachari*[4], in which the question arose as to the nature of the interest purchased by a purchaser in execution of a money decree obtained against the father. The argument was that

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1. (1914) L R 41 I A. 189 27 M L J 93 407 (P C) I.L.R. 42 Cal 56 (P C).
2. (1903) L R 30 I A. 165 I.L R 25 All
3. (1943) 2 M L J 548
4. (1953) 1 M L J 595

what was sold and purchased was only the share of the father and the sons' interest did not pass to the purchaser. That argument was rejected Satyanarayana Rao, J, who delivered the judgment on behalf of the Bench, put the matter thus at page 597 :

"No such contention seems to have been raised in the plaint by the plaintiffs-appellants and it is perhaps for that reason that no material has been placed before the Court such as the sale proclamation, etc, to consider whether what was sold was the property itself or only the right, title and interest of the judgment-debtor There is the sale certificate, Exhibit B-3, which however *states that what was sold was the property described in the schedule* It does not state that what was sold was *only* the right, title and interest of the judgment-debtor "

It is significant to notice that the learned Judge has emphasized that the fact that the property as a whole is described in the schedule and that the schedule did not expressly say that what was sold was *only* the right, title and interest of the judgment-debtor, would indicate that what was sold was the entire property From this decision, it is seen that so long as there is no exclusion of the share of the son, the sale of the entire property, as such described in the sale certificate, would be sufficient to convey the entire property. In the instant case, there is not only no exclusion of the shares of the sons, but what was sold was expressly the entire 2/3rd share using the "all estate clause" Further, under section 8 of the Transfer of Property Act, in the absence of a different intention expressly or by necessary implication, a transfer of property should pass to the transferee all the interest which the transferor is capable of passing in the property This principle underlying section 8, Transfer of Property Act, was applied by the Bench decision in *Muthiah Chettiar* v *Rajalu Ayyar Nagaswami Ayyar & Co* [1], already referred to. For all these reasons, I hold that the Official Assignee intended and actually conveyed the 2/3rd share in the house including the plaintiff's shares and the first defendant also bargained for and purchased a 2/3rd share in the entire house

Even assuming that under Exhibit B-1, the shares of the plaintiffs were no conveyed, the plaintiff's rights, long ago, became barred by limitation and extinguished, as a result of ouster Learned Counsel for the appellants drew my attention to some decisions in which it was held that as between co-owners, the mere fact that one co-owner is in possession of the entire property would not be sufficient evidence of ouster so as to extinguish the rights of the other co-owner. The principle of those cases will have no application in the instant case as in this case there has been an alienation by the Official Assignee which amounts to alienation by a co-owner to a stranger In such a situation, the decision of the Bench of this Court in *Palani Pillai* v *Ibrahim Rowther*[2], clearly applies. In that case in respect of property owned by the members of a Muhammadan family, some of the co-owners executed a usufructuary mortgage of certain specific items and the mortgagee entered into possession of the mortgaged items It was held that adverse possession *i e.*, ouster in such a case, started from the date of possession by the mortgagee and not from the date of ouster to the knowledge of the other members. The principle of this decision is that while possession of one co-owner is in itself rightful and does not imply hostility, the position is different when the stranger is in possession and that his possession itself indicates that it is adverse to the true owners. It is unnecessary to refer to other cases on the point and it is sufficient to refer to the decision of the Supreme Court in *Chenbasavana* [*Gowd* v *Mahabaleswarappa*[3], in which the principle was applied in the case of a lease by the father including the son's share. Learned Counsel for the appellants lastly urged that in the instant case, the plaintiff's father and grand-father had been in occupation of the house and that that should be regarded as recognition of the plaintiffs' right to a 5/21 share. This argument is totally devoid of substance. So far as the 1st plaintiff is concerned, in the same place he was living in a rented house and came to occupy the house in 1956. In the affidavit which he filed in Appeal No. 65 of 1961, Exhibit B-9, he has stated that it was only in 1951, he came to know that the suit property was his family property and that it was only when he began to live in a rented house that

1 (1943) 2 M L J 548 15
2 (1942) 2 M L J 321. I L.R (1943) Mad
3 (1954) 1 M L J 714 (1954) S C J 475.

some villagers told him that he need not live in a rented house when he has himself got a house meaning the suit house, in his own right. This shows that till 1956, the 1st plaintiff never knew that he had a right in this house. Under these circumstances, it is impossible to recognise the possession, if any, of the plaintiffs' father or grand-father as referrable to the plaintiffs' right Unless the plaintiffs are able to establish that the first defendant allowed the plaintiffs' father and grand-father to remain in occupation of the house, recognising the plaintiffs' right in pursuance of an arrangement with the plaintiffs, express or implied, the possession of their father, even if true, would not enure for the benefit of the plaintiffs. This question has been considered by the learned District Munsif in paragraphs 12 and 13 of the judgment The conclusion arrived at by him is correct and is supported by adequate and satisfactory evidence, with the result that the plaintiffs' right, if any, must be deemed to have been extinguished by ouster and adverse possession from the year 1930 I have no doubt in my mind that all these thirty years, the 1st plaintiff himself knew that the entire 2/3rd share in the house had been told to the first defendant It was only as a result of recent misunderstandings, the plaintiffs had embarked upon this frivolous and vexatious litigation Looked at from any point of view, the plaintiffs' suit lacks substance and has been rightly dismissed

The Second Appeal is dismissed with costs No leave

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR M ANANTANARAYANAN, *Chief Justice* AND MR JUSTICE M NATESAN

R. M. P. M. Ranganathan Chettiar .. *Appellant**

v.

A. Annamalai Mudaliar and others .. *Respondents.*

Hindu Succession Act (XXX of 1956), *section* 6, *proviso—Scope and applicability—Hindu male dying intestate leaving his son and the son of a predeceased daughter—Proviso if attracted*

The argument that for the proviso to section 6 of the Hindu Succession Act to apply by reason of the existence of a male relative claiming through a female relative, the female relative through whom he claims must have survived the deceased coparcener, is untenable The proviso requires that there must be surviving the deceased either a female relative specified in Class I of the Schedule to the Act or a male relative claiming through such female relative A reference to Class I of the Schedule would show that if there is a female relative surviving the deceased a male relative who can claim through her has no place in the array of heirs therein The expression " such female relative" in the ratter part of the proviso can therefore only mean a female relative specified in Class I and not a female lelative alive at the opening of the succession

Hence, reading section 6 along with other provisions of the Act, there can be no doubt that in case where the father of a Mitakshara Joint Hindu family dies intestate leaving surviving him, his son and the son of a predeceased daughter, the proviso to section 6 would be attracted and both the son and the son of the predeceased daughter would succeed to his interest in the coparcenary property simultaneously as Class I heirs and as tenants-in-common

Words must normally receive their obvious and populai meaning in the context and not strained to make the provision unworkable

Appeal against the Decree of the Court of the Subordinate Judge, Tiruchirapalli dated 14th November, 1961 in Original Suit No 168 of 1959.

R. Ramamurthy Ayyar, for Appellant.

R Gopalaswamy Ayyangar and *N. Palaniappan*, for Respondents.

The Judgment of the Court was delivered by

Natesan, J.—A simple question in the applicability of section 6 of the Hindu Succession Act arises for consideration in this appeal by the plaintiff. The suit was for recovery of a sum of Rs. 54,627 50 P. due under a security bond executed by defendants 1 to 9 in the suit in favour of one Somasundaram Chettiar, the father of the plaintiff. The 10th defendant to the suit is the son of a predeceased daughter

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*Appeal No. 64 of 1962 4th November, 1966.

of this Somasundaram Chettiar. There is no serious dispute as to the liability for the amount claimed and the only matter seriously put in issue is the claim of the 10th defendant to a 1/4th share in the suit amount under the Hindu Succession Act. The trial Court has upheld his claim and in granting a preliminary decree against defendants 1 to 9 in favour of the plaintiff and the 10th defendant, declared their respective shares in the amount as 3/4th and 1/4th.

There is no dispute that Somasundaram Chettiar died as a member of a Mitakshara Joint Hindu family leaving surviving his son, the plaintiff in the suit and the 10th defendant, son of a predeceased daughter Somasundaram Chettiar died on 1st December, 1957 after the Hindu Succes ion Act of 1956 came into force. It is stated that there is a suit pending between the plaintiff and the 10th defendant, Original Suit No 1 of 1958 on the file of the Sub-Court, Devakottai, instituted by the 10th defendant for partition and separate possession of a 1/4th share in the joint family properties. Section 6 of the Act while affirming the Mitakshara law of survivorship applicable to coparcenary property to an extent by a proviso engrafts a vital exception, conferring new rights on certain female heirs and the son of a predeceased daughter of a deceased coparcener in his interest in the coparcenary property at the time of his death. *Explanation* I to section 6 provides that the interest of a Hindu Mitakshara coparcener for the purpose of the section shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death Where the proviso to section 6 applies, the interest of the deceased devolves by testamentary or intestate succession as the case may be under the Act, the interest does not survive to the remaining coparceners automatically and *eo instante* on the death. Section 30 of the Act enables the coparcener to make a testamentary disposition of his interest in the coparcenary property. Section 6 runs thus:

> "When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:
>
> Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

Plainly read, in a case falling under the proviso the interest of the deceased coparcener where he has left no will, will devolve by intestate succession upon the persons alive at the time of his death who are among the 12 preferential heirs specified in Class I of the Schedule. Under section 8, the property of a male Hindu dying firstly devolves upon the relatives specified in Class I of the Schedule. As the proviso comes into play only after the deceased had left surviving the relatives in Class I specified in the proviso, the sharing of the interest will be only among Class I heirs. Under section 9 of the Act they inherit that interest simultaneously and as provided for in section 19 of the Act, share as tenants-in-common.

Learned Counsel Mr. R. Ramamurthi Iyer for the plaintiff-appellant contends that for the proviso to apply by reason of the existence of a male relative, the female relative through whom he claims must have survived the deceased coparcener. It is argued that as admittedly the 10th defendant is the son of a predeceased daughter, the proviso does not apply. To sustain this interpretation learned Counsel relies first upon the expression "such female relative" found in the proviso. The proviso requires that there must be surviving either a female relative specified in Class I or a male relative claiming through "such female relative". The argument is that by qualifying the female relative in the latter part of the proviso by the word "such" reference is made to the surviving female relatives mentioned in the earlier part of the proviso. It is stated that the word "such" brings in with it the qualification that the female relative must be a relative whom the deceased had left surviving him. This argument is on the face of it untenable. A reference to Class I of the Schedule would show that if there is a female relative surviving the deceased, a male relative who can claim through her

has no place in the array of heirs therein. There is no provision for the daughter and daughter's son to take together simultaneously as heirs under Class I. The daughter if alive would exclude her son or daughter and would herself become a fresh stock of descent. The phrase "female relative" and the expression "such female relative" in the latter part of the proviso can only mean a female relative specified in Class I and not a female relative alive at the opening of the succession. The word "surviving" in the proviso qualifies both the female relative first mentioned therein, and the male relative following.

Emphasis is next laid on the requirement of the proviso that the surviving male relative of the deceased must be one who claims through a female relative mentioned in Class I. It is submitted that a person cannot claim through a female relative unless the female relative was alive when the succession opened and had herself inherited. This argument again overlooks what has been pointed out already. To accede to it would be to overlook that then the female becomes a fresh stock of descent, while section 6 deals with devolution of the interest of a deceased coparcener. The language used is not claims from or claims under. If a female relative specified in Class I is alive, then her male descendants can make no claim to the estate of the deceased coparcener. Section 6 by itself does not provide a set of heirs. For that we are referred to other provisions of the Act. In our view that all the expression "claims through" is the proviso means in "tracing relationship through." The male relative must be one who traces relationship to the deceased through a female relative specified in Class I, and he must also be a male relative specified in Class I The claim he makes is not with reference to property but in regard to relationship. When the relationship is established, law gives him his share in the property. It may be pointed out that the only male relative specified in that class who fulfils both the requirements, is the son of a predeceased daughter and the language of the proviso in its latter part when indicating this only male relative through a female relative is rather involved. But the scope and intention is clearly brought out. Words must normally receive their obvious and popular meaning in the context and not strained to make the provision unworkable. Reading section 6 along with the other provisions of the Act, there can be no doubt that in a case like the present one where the father dies intestate leaving an undivided son and a son by a predeceased daughter, both the son and the daughters' son succeed to his interest in the coparcenary property simultaneously as Class I heirs and tenants-in-common. It follows that the plaintiff and the 10th defendant share equally the interest the father had in the suit security bond. The lower Court has therefore correctly held that the plaintiff gets a 3/4th share in the suit debt and the 10th defendant a 1/4th share.

It is submitted for the plaintiff that the learned Subordinate Judge had divided the mortgage amount between the plaintiff and the 10th defendant and given a decree accordingly when there is a suit for partition pending between the parties wherein adjustments have to be made. We do not read the learned Subordinate Judge as having decreed the suit severally in favour of the plaintiff and the 10th defendant in their respective shares. The 10th defendant himself has referred to the pending partition suit in the family and prayed only for a joint decree in favour of himself and the plaintiff. Though the learned Subordinate Judge specifies the shares of the plaintiff and the 10th defendant, he has given only a joint decree in their favour. It will be for the parties to apply in the partition suit O.S. No. 1 of 1958 on the file of the Subordinate Judge, Devakottai, for this decree also to be taken into consideration in the general partition as an item for division, if that is considered necessary or convenient. This clarification is more than sufficient to calm the apprehension of the plaintiff in the matter.

In the result the appeal fails and it is dismissed with costs.

V.K. *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE P. RAMAKRISHNAN, MR. JUSTICE R. SADASIVAM AND MR. JUSTICE M. NATESAN

Athiappa Goundar and others .. *Petitioners**

v.

S. A. Athiappa Pandaram and others .. *Respondents*

Criminal Procedure Code (*V of* 1898), *section* 145 (4), *second proviso—Fiction enacted under—Crucial date for invoking—If date of petition or date of preliminary order*

Maxim—Actus curiae neminem gravabit—*When can be invoked*

Maxim—Nunc pro tunc—*Scope*

The crucial date under the second proviso to section 145 (4) of the Criminal Procedure Code, is the date of the preliminary order For the purpose of this proviso a specific period of two months next before the date of such order is fixed for invoking the fiction embodied in the proviso and there is no room for applying any such fiction relating to the date of the preliminary order, to the date of the petition under sub-section (1) of section 145 of Criminal Procedure Code

Thus the second proviso could be successfully invoked only if the party has been forcibly or wrongfully dispossessed within two months prior to the date of the preliminary order and there is no room for applying any fiction that the date of the preliminary order should be deemed to be the date of the petition and to give relief even to persons forcibly and wrongfully dispossessed within two months prior to the date of petition

Narayana v *Kesappa*, I L R (1951) Mad 951 (1951) 1 M L J 102 A I R 1951 Mad 500, overruled.

Venkataramiah v *Sitharamiah*, (1960) M L J (Crl) 732 (1960) 2 An W R 383 A I R 1961 A P 208 (F B) and *Ganga Bux Singh* v *Sukhdin*, A I R 1959 All 141 (F B), followed

The maxim *actus curiae neminem gravabit* (act of Court shall prejudice no man) is founded upon justice and good sense and affords a safe and certain guide for administration of the law But the second proviso to section 145 (4) of Criminal Procedure Code, is clear and unambiguous and it is not possible to use this maxim to enlarge the period fixed thereunder by applying the fiction *nunc pro tunc* (now for then) and treating the preliminary order made on a later date as one passed on the date of the petition. The power of the Court to enter judgment *nunc pro tunc* is a power at CommonLaw and it is adopted in accordance with the ancient practice of the Court in order to prevent prejudice to a suit or from delay occasioned by the act of the Court Where however, the delay is not attributable to the act of the Court the above maxim does not apply The maxim could be invoked and applied in individual cases to a party who has done all he should do under the statute and is prejudiced solely by the delay or mistake of the Court It is not possible to visualise how the maxim could be invoked generally to interpret the second proviso to section 145 (4), Criminal Procedure Code, in a liberal manner

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the Sub-Divisional Magistrates of Sankari and Ulundurpet, dated 12th June,-1964 and 5th February, 1965 and made in M C Nos. 59, 188 and 189 of 1964 respectively, etc.

These cases namely (1) Crl. R C No 953 of 1964 coming on for hearing before Kunhamed Kutti, J on 20th April, 1965, (2) Crl.R.C No. 181 of 1965 coming on for hearing before Sadasivam, J , on 28th June, 1965 (3) Crl R.C No. 499 of 1965 coming on for hearing before Sadasivam, J , on 27th August, 1965, the following orders were made respectively:—

Kunhamed Kutti, J. ** (Crl R.C. No 953 of 1964) —The point urged before me by learned Counsel for the petitioners is that the order of the learned Sub-Divisional Magistrate, directing the order passed by him under section 145 (4), Criminal Procedure Code, to take effect from the date on which the petition was filed under section 145 (1), Criminal Procedure Code,

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* Crl R C Nos 953 of 1964, 181, 499 and 821 of 1965 (Crl.R P.Nos. 929 of 1964, 175, 485 and 813 of 1965.) 25th August, 1966

** 20th April, 1965

is based on the Bench ruling of this Court in *Narayana* v. *Kesappa*[1], which has been dissented from by a Full Bench of the Andhra High Court in *Venkataramiah* v *Sitha-Ramiah*[2], and a Full Bench of the Allahabad High Court in *Ganga Bux Singh* v *Sukhdin.*[3] It is pointed out that other High Courts have also taken a contrary view, as for instance, the Bombay High Court in *State* v *Ranjivan Kalusam*[4], the Patna High Court in *Mohammed Yunus* v. *Bajrang*[5], and the Punjab High Court in *Sri Ram* v. *The State*[6]. In Crl R C No 1766 of 1962, disposed of on 16th December, 1963, Kailasam, J., has followed the Bench ruling of this Court But, the learned Counsel for the petitioners says that there are other Single Bench rulings prior to the Bench ruling which have taken a view not strictly in accord with the view expressed by the Bench decision in *Narayana* v *Kesappa*[1]. In the circumstances, it seems to me that it is necessary that the matter is considered by a Bench of two or more Judges and an authoritative ruling on the point is given by this Court.

The papers will, therefore, be placed before my Lord the Chief Justice for such orders as he deems fit in the matter.

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*Sadasivam, J*** (Crl R.C No 181 of 1965).—Petition by the respondents in M C. No 188 of 1964 on the file of the Sub-Divisional Magistrate, Ulundurpet, to revise the order under section 145, Criminal Procedure Code, declaring that the respondent herein is in possession of the three items of property mentioned in the petition, and that he will continue to be in possession until evicted in due course of law The learned Advocate for the petitioners herein contended that the affidavits filed by him on the question of possession should have been accepted But I am not inclined to interfere with the finding of fact given by the lower Court as there are two circumstances in favour of the respondent herein, namely, the production of the cist receipt and the fact that the sale deed in his favour is earlier It is true that the vendors in favour of the parties cannot validly convey title of the minor's property without the sanction of the Court. But in these proceedings we are concerned only with the question of possession.

The learned Advocate for the petitioners, however, contended that as the alleged dispossession though within two months of the petition was more than two months prior to the date of the order passed by the lower Court, the order of the lower Court is illegal. He brought to my notice that in Crl R C No 953 of 1964 on the file of this Court a similar question arose for decision and Kunhamed Kutti, J., has directed that it is necessary that the matter is considered by a Bench of two or more Judges and directed that the papers be placed before the Honourable Chief Justice for such order as he deems fit in the matter. In my opinion the same order should be passed in the present case also and it is accordingly ordered.

*Sadasivam, J**** (Crl. R C No. 499 of 1965) —Petition by 'B' party to revise the order of the Additional First Class Magistrate, Chidambaram, in M C. No. 77 of 1965, under section 145 (6) of the Code of Criminal Procedure. The learned Advocate for the petitioners relied on the decision in *Pakamaraja Naicker* v *Chidambara Nadar*[7], that the absence of a preliminary order under section 145 (1) would vitiate the entire proceedings But there is no scope for invoking the said decision, as there is admittedly an order under section 145 (1) of the Criminal Procedure Code, in this case.

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1 (1951) 1 M L J 102 I L R (1951) Mad 951 A I R 1951 Mad 500
2 (1960) M L J (Crl) 732 : (1960) 2 An W R 383 A I R 1961 A P 208 (F B).
3 A I R 1959 All 141 (F B)
4 A I R 1962 Bom 8
5 A R I 1962 Pat 352.
6 A I.R 1958 Punj 47.
7. (1955) Cr L J 700

28th June, 1965. * 27th August, 1965.

There is a criminal case against the petitioners for criminal trespass at the instance of the 'A' party and the complaint in that case was that the petitioners trespassed on the land in dispute on 18th December, 1964 In fact in the order sought to be revised it is stated that the petitioners trespassed and forcibly got into possession of the suit land on 18th December, 1964 It is true that the said trespass was within two months prior to the date of the petition, namely, 15th February 1965, but it was more than two months prior to the date of the preliminary order under section 145 (1) of the Criminal Procedure Code, namely, 1st March, 1965. There is a conflict of decisions as to whether the crucial date is the date of the petition or the date of the preliminary order In the second proviso to section 145 (4) it is stated that if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date Thus, the section refers to the date of the order as the crucial date Kunhamed Kutti, J., has referred this question for final decision to a Bench in C R C No 953 of 1964 and I have made a similar reference in C R C. No 181 of 1965 The only point to be considered in this case is the said question This case is also directed to be posted along with the said cases for decision on the point.

In pursuance of the above orders these cases came on for hearing before a Bench (*Ramakrishnan* and *Sadasivam, JJ*)

The Order of the Bench Court was pronounced by

Ramakrishnan, J *—After hearing the Counsel on both sides and the learned Public Prosecutor, it is our opinion, that the matter requires consideration by a Fuller Bench. Therefore, the papers will be placed before my Lord the Chief Justice for directions in the matter.

In pursuance of the above order these cases came on for hearing before a Full Bench (*Ramakrishnan, Sadasivam* and *Natesan, JJ*)

K Gopalachari for Petitioners in Crl R C No 953 of 1964 and 181 of 1965 and for Respondents in Crl R C No 821 of 1965

P. Sharfuddin and *M. R Krishnan* for Respondents in Crl. R.C. No. 953 of 1964

C D. Sekkizhar and *Fyzee Mohammed,* for Petitioners in Crl. R C. No. 489 of 1965.

G Gopalaswamy for *K V Venkataseshadri,* for Petitioner in Crl R.C No. 821 of 1965 and for Respondents in Crl. R C. No. 181 and 489 of 1965

Public Prosecutor on behalf of the State in all cases.

The Opinion of the Court was expressed by

*Sadasivam, J***—The question referred to the Full Bench is whether the period of two months mentioned in the second proviso to section 145 (4), Criminal Procedure Code, as the period within which a person forcibly and wrongfully dispossessed could get relief should be literally and strictly construed with reference to the date of the preliminary order, as mentioned in that proviso, or whether it should be liberally and equitably construed with reference to the date of the petition.

There is conflict of judicial opinion on this question The leading decision in favour of the liberal interpretation is the Bench decision of this Court in *Narayana* v. *Kesappa*[1], which refers to the conflicting decisions of this High Court on this question A Bench decision of the Andhra High Court in *Subba Raju* v *Koneti Raju*[2], delivered

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* 3rd December, 1965 **25th August, 1966.

1 I L R (1951) Mad 951 (1951) 1 M L J. 02 A I R. 1951 Mad 500

2 (1955) An W R 114 A I R 1955 Andh. 99

by Subba Rao, C J, as he then was, dissented from the above decision and took the other view based on literal interpretation of the proviso As the earlier Bench decision of this High Court was rendered prior to the formation of the Andhra High Court, and was binding on that High Court, the question was referred to a Full Bench of the High Court, in *K Venkataramiah* v *C Sitharamiah*[1], and it relied on the later Bench decision of its own High Court and did not follow the earlier Bench decision of this Court It held that the crucial date under the second proviso to sub-section (4) of section 145, Criminal Procedure Code, is the date of the preliminary order, that for the purpose of this proviso, a specific period of two months next before the date of such order is fixed for invoking the fiction embodied in the proviso and that there is no room for applying any such fiction relating to the date of the preliminary order to the date of the petition under sub-section (1) of section 145, Criminal Procedure Code In *Subarna* v *Kartika*[2], the Orissa High Court and in *Bhadramma* v *Kotam Raj*[3], the Hyderabad High Court followed the earlier Bench decision of this High Court in *Narayana* v *Kesappa*[4] dissenting from earlier decisions of their own Courts to the contrary. The decision of the Hyderabad High Court is no longer good law after the Full Bench decision of the Andhra Pradesh High Court referred to above. A Full Bench of the Allahabad High Court in *Ganga Bux Singh* v *Sukhdin*[5], has also dissented from the Bench decision of this High Court In fact, it is clear from the Full Bench decision of the Andhra Pradesh High Court that all the other High Courts had dissented from the view expressed in the Bench decision of the Madras High Court. It is unnecessary to refer to all the decisions in detail, and it is sufficient to consider the principles on which they are based in order to decide the question referred to the Full Bench

Chapter XII of the Criminal Procedure Code, which contains section 145, is one of the Chapters in Part IV of the Criminal Procedure Code dealing with prevention of offences. The object of a proceeding under section 145, Criminal Procedure Code, is to put an end to a dispute as to immovable property so as to prevent a breach of the peace. In *Nanhe Mal* v. *Jamil Ur Rahman*[6], Mukerji, J, said :

> "An order under Chapter XII is more or less an executive order and it is designed to avoid a breach of the peace "

In *Bhinka* v *Charan Singh*[7], the Supreme Court has held that the order of a Magistrate under section 145, Criminal Procedure Code, is merely a provisional police order based upon the fact of previous possession and it is made only for the purpose of preventing a breach of the peace, and being made irrespective of the rights of the parties, it cannot enable the person in whose favour it is made to resist a suit based on title. It was pointed out in that decision that the foundation of jurisdiction under section 145, Criminal Procedure Code, being only an apprehension of a breach of the peace the power conferred on the Magistrate is a limited one, namely, to make a temporary order regarding retention of possession on the basis of proved prior possession, irrespective of legal rights and titles to possession

The above principles should be borne in mind in dealing with the question under reference The preliminary order under section 145 (1), Criminal Procedure Code, is the basis for the subsequent enquiry and the passing of the final order. It should be noted that proceedings under section 145, Criminal Procedure Code, are taken on police reports, or on any other information which usually takes the form of a petition by a private party. When an application is made to a Magistrate for action under section 145, Criminal Procedure Code, the usual practice is to send it to the police and get a report on the question whether there is any likelihood of

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1 (1960) M L J (Crl) 732 (1960) 2 An W R 383 • A I R 1961 Andh Pra 208 (F B)
2 A I R 1954 Orissa 183
3 A I R 1955 Hyd 140
4. (1951) 1 Mad 102 I L R (1951) Mad 951 A I R 1951 Mad 500
5 A I R 1959 All 141 (F B)
6 (1925) 23 A L J 41
7 (1960) S C J 892 A I R 1959 S C 960

a breach of the peace, though there is no specific provision in the section authorising such a procedure. Before making the preliminary order under section 145 (1), Criminal Procedure Code, the Magistrate should be satisfied from the police report or other information, that a dispute about immoveable property exists and that it is likely to cause a breach of the peace The object of a proceeding under section 145, Criminal Procedure Code, being the prevention of the breach of the peace supposed to be imminent, it should be the primary aim of the Magistrate making the enquiry to arrive at his decision with the utmost promptitude In fact, sub-section (4) of section 145, Criminal Procedure Code, requires that the enquiry should be concluded, as far as may be practicable, within a period of two months from the date of the appearance of the parties But there is nothing in section 145 (1), Criminal Procedure Code, to justify the view expressed in *Narayana* v *Kesappa*[1], that the passing of a preliminary order should immediately follow the presentation of the complaint, or the receipt of the police report The preliminary order can be made only after the subjective satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists, and the crucial date is the date of the Magistrate's recording his satisfaction in his preliminary order It is with reference to the said date that the Code contemplates an enquiry as to the possession of the parties and it is also the same date with reference to which the two months' period mentioned in the proviso has to be counted

The history of the legislation has been relied on in both the Bench decisions, of the Madras High Court in *Narayana* v *Kesappa*[1], and of the Andhra High Court in *Subba Raju* v *Koneti Raju*[2] But opposite conclusions have been reached as to the intention of the Legislature in introducing the proviso In the corresponding sections of the old Criminal Procedure Codes of 1861, 1872 and 1882, there was no provision corresponding to the second proviso to sub-section (4) of section 145, Criminal Procedure Code, fixing the date in relation to which the Magistrate had to make the enquiry and the proviso was first enacted in 1898 evidently to avoid the anomaly pointed out by the Calcutta High Court in *Katras Jherriah Coal Co* v. *Subkrista Das & Co* ,[3] At page 303 the learned Judge observed:

> "But to hold that under such circumstances the Magistrate is precluded from enquiring into anything before the date when he recorded his own proceedings, which he now tells us he ought to have done thirteen days before, is, we think, to allow a person who has been acting in an unwarrantable manner to misuse the process of the law to enable him to carry out his high handed and improper scheme and this we cannot believe to have been the intention or the Legislature "

Under section 145 (4), Criminal Procedure Code, the Magistrate should decide who was in actual possession of the property in dispute on the date of the preliminary order. By virtue of the second proviso to sub-section (4) of section 145, Criminal Procedure Code, a person who has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order is deemed, as it were, by a legal fiction to be in possession on the date of the preliminary order, though he did not actually have any such possession. With due respect to the learned Judge, Govinda Menon, J , he appears to have strained the principle of the fiction too far in observing in *Narayana* v *Kesappa*[1] that by such legal fiction the party forcibly and wrongfully dispossessed should be deemed to be in possession not only on the date of the preliminary order, but also on the date of the petition. " Fictions of law " as observed by Lord Mansfield,

> " hold only in respect of the ends and purposes for which they were invented When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth " (*Morris* v *Pugh*) [4]

See Broom's Legal Maxims, Tenth edition, page 81 and 82). It is not open to this Court to add to the legal fiction created by the second proviso

1. I L R (1951) Mad 951 (1951) 1 M L J Pra 99
102 · A I R 1951 Mad 500 at 504
2. (1955) An W R 114 A I R 1955 Andh.
3 I L R (1895) 22 Cal 297.
4 3 Burr 1241 at 1243.

to sub-section (4) of section 145, Criminal Procedure Code, any other fiction that the possession of the party forcibly and wrongfully dispossessed should be deemed to be in actual possession even on the date of the petition and not merely on the date of the preliminary order as mentioned in the proviso. Thus the history of the legislation does not really support the reasoning of the decision in *Narayana* v. *Kesappa*[1].

The ratio of the decision in *Narayana* v. *Kesappa*[1], is based on the maxim *actus curiae neminem gravabit* (act of Court shall prejudice no man) and *nunc pro tunc* (now for then) According to the decision no appreciable time should elapse before the presentation of the complaint or the receipt of the police report and the passing of the preliminary order and that the date on which the party moved the Magistrate should be taken as the crucial date This view has been stressed at some length in the decision in *Subarna* v *Kartika*[2], by Panigrahi, C J But we have already pointed out that there is nothing in the Code to show that the Magistrate is bound to pass the preliminary order immediately on receiving a complaint, or a police report, or other information with regard to a dispute regarding immovable property and even before being satisfied about the likelihood of its causing a breach of the peace Such a preliminary order can be passed only on the subjective satisfaction of the Magistrate as required under section 145 (1), Criminal Procedure Code. The Legislature has fixed the date of the preliminary order as the crucial date not only for the purpose of ascertaining as to who was in possession of the property in dispute, but also for determining the two months period within which the forcible and wrongful dispossession took place. In fact, section 146, Criminal Procedure Code, contemplates the circumstances under which a Magistrate could refer the dispute to a civil Court of competent jurisdiction to secure a decision as to who was in possession of the property in dispute on the date of the preliminary order We would not be justified in introducing the date of the petition as the crucial date, instead of the date of the preliminary order, mentioned in section 145, Criminal Procedure Code. We have already pointed out that proceedings under section 145, Criminal Procedure Code, are taken on police report or other information and not necessarily on a petition filed by the affected party It has been rightly pointed out in *Subba Raju* v *Koneti Raju*[3], that the decision to make a final order does not depend on the manner in which the proceedings are initiated but on the satisfaction of the Magistrate that a breach of the peace was imminent on a particular date when he makes the preliminary order.

The main criticism against the literal construction of the language of the proviso is that it would put a premium on dishonest and cantankerous parties who can always see to it that the enquiry is delayed and that the party dispossessed is ultimately deprived of the benefit of the legal fiction created by the proviso. This view was expressed by Panigrahi, C J., in *Subarna* v *Kartika*[2]. In *Krishnam Raju* v *Chintala Swami Naidu*[4], Wallace, J , in giving a liberal interpretation to the proviso, observed as follows :

> " I am not prepared at present to subscribe to the proposition that a party taking possession by force must be retained in possession if, owing to delay, after the dispossessed party has asked the Court to take action, on the part of the Court taking action, over two months have elapsed before the Court finally makes up its mind to issue a preliminary order "

This observation was quoted with approval by Devadoss, J., in *Srinivasa Reddy* v. *Dasaratharama Reddy*[5], where he expressed his view that

> " a reasonable interpretation ought to be placed upon the proviso and not a literal interpretation which would defeat the very object of section 145 (4) which relates to dispossession of immovable property "

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1 (1951) 1 M L J 102 I L R (1951) Mad. 951 A I R 1951 Mad 500 at 504.
2 A I R 1954 Orissa 183 at 186
3 (1955) An W R 114 A I R 1955 Andh Pra 99 at 103.
4 (1927) 104 I C 110 A I R 1927 Mad 816 (1)
5 (1929) 56 M L J 33 113 I C 336 I L.R 52 Mad 66 at 68

But before applying this equitable principle it would be necessary to ascertain the acts of a Court which prejudiced a party, to apportion the blame between the Court and a party and to fix the period of delay attributable to the Court's act. Subba Rao, C J., as he then was, pointed out in *Subba Raju* v. *Koneti Raju*[1], that

"in such an enquiry, it cannot be premised that in every case, the delay caused by the Court, if added would synchronise with the date of the application "

and observed that it would be a futile enquiry. We have already pointed out how the proviso was added to remedy the anomaly pointed out by the Calcutta High Court.

The maxim *actus curiae neminem gravabit* (act of the Court shall prejudice no man) is founded upon justice and good sense and affords a safe and certain guide for administration of the law. It is clear from Broom's Legal Maxims, Tenth edition, pages 73 to 75 under what circumstances the principle of the maxim could be invoked by a party. Thus the following passage at page 73 of the book shows the scope of the maxim and illustrates how and when a party could invoke it.

" In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case , and, therefore, if one party to an action die during a *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, for which neither party should suffer"

Again at page 74 of the book it is stated that the power of the Court to enter judgment *nunc pro tunc* is a power at common law and it does not depend upon statute and it is adopted in accordance with the ancient practice of the Court in order to prevent prejudice to a suit or from delay occasioned by the act of the Court. Where, however, the delay is not attributable to the act of the Court, the above maxim does not apply It is clear from page 75 of the same book that it is the duty of a Judge to try the causes set down for trial before him, and yet, if he refused to hold his Court, although there might be a complaint in Parliament respecting his conduct, no action would lie against him and that in such a case a wrong might be inflicted by a judicial tribunal, for which the law could supply no remedy Thus the maxim could be invoked and applied in individual cases to a party who has done all he should do under the statute and is prejudiced solely by the delay or mistake of the Court. We are unable to see how the maxim could be invoked generally to interpret the second proviso to sub-section (4) of section 145, Criminal Procedure Code, in a liberal manner. In other words, it is not possible to use the maxim to enlarge the period fixed under the proviso by applying the fiction *nunc pro tunc* and treating the preliminary order made on a later date as one passed on the date of the petition.

The second proviso to sub-section (4) of section 145, Criminal Procedure Code, is clear and unambiguous As pointed out in *Nagendranath Dey* v. *Sureshchandra Dey*[2].

" The fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship But in construing such provisions, equitable considerations are out of place and that strict grammatical meaning of the words is, their Lordships think, the only safe guide "

We have already pointed out that the object of section 145, Criminal Procedure Code is only to prevent a breach of the peace resulting from disputes about immoveable properties and not to finally decide the rights of the parties The delay and hardship which might result in some cases in consequence of literal and strict interpretation will not be a justiciation for not giving effect to the plain words of the section. A person who is unlawfully dispossessed from his immoveable property

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1 (1955) An W R 114 A I R 1955 Andh Pra. 99 at 103.

2 (1932) L R 59 I A 283 63 M L J 329 : A I R. 1932 P C 165 at 167

has a summary remedy under section 9 of the Specific Relief Act, and if he fails to move the Court within six months from the date of dispossession, he will lose his summary remedy and he will have to file a regular suit Thus if a party has been forcibly and wrongfully dispossessed more than two months prior to date of the preliminary order, his remedy is not under section 145, Criminal Procedure Code, which is intended only for the prevention of offences, but elsewhere.

We are of the opinion that the second proviso to sub-section (4) of section 145, Criminal Procedure Code, could be successfully invoked only if the party has been forcibly or wrongfully dispossessed within two months prior to the date of the preliminary order and that there is no room for applying any fiction that the date of the preliminary order should be deemed to be the date of the petition and to give relief even to persons forcibly and wrongfully dispossessed within two months prior to the date of the petition *Narayana* v *Kesappa*[1] is overruled

The references are answered accordingly.

V K. *Answered accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M NATESAN

Neelamma Pillai Dhevaki Amma and another .. *Appellants**

v.

Kanakku Velayutham Pillai Narayana Pillai and others .. *Respondents*

Civil Procedure Code (V of 1908), section 11, Explanation *IV—Mortgage suit—Mortgagee acquiring paramount title to mortgaged property during pendency of, not setting it up—Subsequent suit based on paramount title—If barred by constructive* res judicata

The law is well established that if a defendant in a mortgage suit has title independent of the mortgage and paramount or adverse he is not bound to set it up in the mortgage suit No doubt in a suit for redemption of a mortgage the adding as a party of a person claiming title to the mortgaged property, is not obnoxious to the rules relating to the joinder of parties But that is quite different from saying that a person having a paramount claim is a necessary party Hence where pending a mortgage suit the mortgagee acquires paramount title to the mortgaged property he is not bound to plead it in the mortgage suit and a subsequent suit by him based on paramount title would not be barred by the rule of constructive *res judicata* found in *Explanation* IV to section 11 of the Civil Procedure Code

Appeal against the Decree of the Court of the Subordinate Judge, Nagercoil, in Appeal Suit No 686 of 1957 preferred against the decree of the Court of the District Munsif (Additional), Kuzhithurai, in O.S No. 200 of 1952.

T R Mani, for Appellants.

M. S Dhanakodia Pillai, V. Shanmugham and *P. Ananthakrishnan Nair,* for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal has been preferred by the plaintiffs and arises out of a suit for declaration of their title to and for partition and separate possession of the eastern 3/4th share in the plaint scheduled property and certain other reliefs They succeeded in their claim in the District Munsif's Court, Kuzhithurai, but lost in appeal before the Subordinate Judge of Nagercoil. The total extent of the suit property which goes under the name Panichathadi Nilam is 12 kurnies or 72 cents. The actual dispute is only in regard to one kurni or 6

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1. (1951) 1 M L J 102 I.L R (1951) Mad 951 ; A I.R. 1951 Mad 500.

* S A. No 1602 of 1962. 22nd September, 1966.

cents, the principal contestant being the third defendant, and the defence in the main is rested on the principle of constructive *res judicata* The relevant facts may therefore be set out.

The suit property, it is stated belonged to Munchira Matom in Jenmi right and had been demised on Kanom by the Matom with the Tarward of defendants 1 to 3 The defendants' Tarwad under Exhibit H, dated 30—9—1073, M.E othied the western 1/3rd of the property, that is, 4 kurnies in extent, to the plaintiffs' ancestor for 3 500 Fns. The plaintiffs were allotted the othi rights in their family partition. It has further been found that in the partition in the defendants' Tarwad the suit property was allotted to the first defendant personally, as it had been acquired with his own funds. In 1935 the Jenmi Matom filed the suit, Original Suit No. 880 of 1110 (M.E) for arrears of Michavaram against the first defendant and in execution of the decree in that suit brought the eastern 3/4th share of the suit property to sale. The 4th defendant in the present suit became the Court auction-purchaser of this eastern 3/4th share or 9 kurnies Exhibit D, dated 3—5—1116, M E being the sale certificate. Subsequent to the Court-auction sale, the present defendants 1 and 2 instituted the suit, O S No. 989 of 1122 M.E on the file of the Principal District Munsif's Court, Kuzhithurai, for redemption of the othi evidenced by Exhibit-H In that suit the present first plaintiff was impleaded as the 4th defendant, and the present second plaintiff as the 11th defendant. There were 21 defendants to that suit, defendants 1 to 16 were impleaded as representing the mortgagees and defendants 17 to 19, as persons in possession under them The 20th defendant to the suit, the present contesting third defendant, a brother of the first defendant was impleaded as a person having also a share in the mortgage The present fourth defendant who had by then became the owner of 9 kurnies by purchase in Court auction was impleaded only as a subsequent encumbrancer and shown as the 21st defendant. The mortgagees-defendants 1 to 16 as well as defendants 18, 19 and 21 were declared *ex parte*. There was a compromise with the 17th defendant and it was recorded that his contentions need not be considered in that suit The 20th defendant, the present third defendant, did not dispute the mortgage or his claim to the share in the mortgage right which appears to have been set out in the plaint. From the issues farmed it seems as if a contention was raised that the mortgagee got possession of only 3 kurnies and not four kurnies under the othi Without any discussion, observing that the defendants were *ex parte* redemption was ordered The judgment provided that defendants 1 to 21 may draw out the balance of the mortgage amount of Rs. 875. The plaint in that suit has not been exhibited. The present first plaintiff who had been impleaded as a mortgagee had filed his written statement in the suit in 1948 ; but later had been set *ex parte* The Court auction purchaser had been *ex parte* right through Pending that suit under the sale deed, Exhibit E dated 21—12—1124, M E , the present plaintiffs purchased the eastern 3/4th share of the suit property from the 4th defendant. The judgment in the redemption suit was subsequent, on 25th January, 1951 The judgment and decree are exhibited as Exhibits II and III.

It will be clear from the above narration of facts that the plaintiffs by their purchase from the fourth defendant are entitled to 9 kurnies in the east of the suit property in their own right. They had possession of 4 kurnies in the west as mortgagees, the entire extent of the suit property being 12 kurnies It follows that an extent of one kurni in the west out of the 9 kurnies which they had purchased from the fourth defendant should also be held to be subject to the othi of which redemption was decreed It is this one kurni that is the subject of the present contest. The third defendant contends that a decree for redemption having been passed against the plaintiffs in O S No 989 of 1122 M E in derogation of their right and title to the one kurni under the Court auction purchase the former proceedings were a bar to their claiming possession of the same. Redemption had been ordered and the mortgage amount had been deposited in Court. The mortgagors had taken possession of the property under the redemption decree. The trial Court overruled the defence and held that there could be no *res judicata*.

Now the present plaintiffs had been impleaded in that suit only as mortgagees. The title of the Court auction purchaser to the 9 kurunies he had taken in the auction was not questioned in that suit and the Court auction purchaser, the 21st defendant, was impleaded in the suit only as a person having some subsequent encumbrance No doubt the suit was one for redemption and possession is a relief which has to be awarded in a redemption suit; but the 21st defendant was not impleaded as a person in possession He was *ex parte* and his title under the Court auction purchase was paramount and outside the controversy in that suit The question is, does this preclude the applicability of the bar of *res judicata* The claim of the present plaintiffs to 9 kurunies in the suit property is under the 21st defendant apart from their position as mortgagees in respect of one kuruni That purchase was *pendente lite* and they would be bound only to the extent the Court auction purchaser is bound by the decree.

This case has come to this Court now for a second time. On an earlier occasion also the plaintiffs had to come upto this Court as appellants. It was then pointed out that the lower appellate Court which had rejected the plaintiffs' claim had not canvassed for decision the points that arose for decision in the case The circumstances in which a paramount claim of a party to the suit would be barred by *res judicata* was indicated by this Court in remanding the appeal for fresh disposal. The following observations of this Court on the earlier occasion may be set out:

> "The main question which the appellate Court had to decide in this case was whether the decision in O S No 989 of 1122 was conclusive so far as the paramount title under the Court auction sale was concerned For that purpose it is necessary to have a clear picture of the pleading in that suit as well as issues The judgment of the lower appellate Court does not show that the pleadings have been fully considered on their bearing on the question of paramount title

Notwithstanding this specific direction of this Court, I am constrained to state that the lower appellate Court has again disposed of the matter in a most perfunctory manner. There is little discussion in the question of *res judicata* and it is completely overlooked that the 4th defendant was *ex parte*, then and that his title was not put in issue, the learned Subordinate Judge only observing that the Court in O S. No 989 of 1122 had gone into the matter and decided that the plaintiffs should surrender possession of the entire western 1/3rd and that therefore the present suit is barred by *res judicata* The learned Subordinate Judge ignores that there was no contest in the earlier suit between the present plaintiffs and the plaintiffs in that suit (the present defendants 1 and 2) as regards any paramount title It was *pendente lite* that the present plaintiffs became entitled to the one kuruni that had been sold away in Court auction Their vendor, though he had been impleaded as a party-defendant in the former suit, was not impleaded as a person in possession of the mortgaged property To start with, the plaint in the former case has not been exhibited and from the statement of the case in the preamble portion to the judgment which was *ex parte* the present plaintiffs are shown only as mortgagees in possession and the Court auction purchase could not have been impugned in that and does not appear to have been impugned. The present contesting defendant, the 3rd defendant, has in the present suit questioned the validity of the Court sale, the decree for michavaram having been passed only against the first defendant This objection has been overruled as wholly without substance, both the Courts having found that the kanom property was the first defendant's self acquisition and had been allotted to him in the partition in his tarward. The law is well established that if a defendant in a mortgage suit has title independent of the mortgage and paramount or adverse he is not bound to set it up in the mortgage suit No doubt in a suit for redemption of a mortgage the adding as a party of a person claiming title to the mortgaged property, it has been held, is not obnoxious to the rules relating to the joinder of parties—see *Manakal Narayanan* v *Venkitajela Aiyer*[1] But this is quite different from saying that a person having a paramount claim is a necessary party to a redemption action The rule of *res judicata* which is sought to be applied in this case is the rule of construction *res judicata* found in *Explanation IV* to section 11, Civil Procedure Code, which provides

1. (1917) 5 L W 615.

that any matter which might and ought to have been made ground of defence in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The Court auction purchaser on the allegations in the former suit had not acquired possession of any portion of the property. It transpires that the entire extent of 12 kurunies was in possession of the plaintiffs under two mortgages, one of them being the subject of the redemption suit. No relief for possession was claimed against him and no declaration was sought impugning his title as Court auction purchaser of 9 kurunies Can it be said in the circumstances that he ought to have put forward his title under the Court auction purchase? It was unnecessary for the present 4th defendant then to have put forward any defence on the basis of his title ; nor was any attack on the then plaintiffs' claim in that suit called for In *Ramamma* v. *Venkatanarayana*[1], the learned Judge Devadoss, J , if I may say so with respect, on an analysis of the case-law neatly summed up the position in the following six propositions :

" 1 A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit If he is made a party he can get himself dismissed from the suit

2 If the mortgagee makes a person defendant who has not derived title from the mortgagor on the ground that he is in possession of the mortgaged property, such person is not a necessary party and need not defend his title to the property

3 In a redemption suit by the mortgagor a person in possession of the mortgaged property can be made a party as it would be convenient to adjudicate on his title in that suit for redemption which is really one for possession

4 Any person interested in the redemption of a mortgage is a necessary party to the mortgage suit

5 The Court has jurisdiction to adjudicate on the paramount title of a person claiming adversely to the mortgagor and the mortgagee if such person is made a defendant to the suit

6 The Court is not bound to adjudicate on the title paramount of a third person if it considers it inconvenient or unnecessary to do so , in other words the Court has a discretion in the matter

The learned Judge concludes that where it is entirely in the discretion of the Court to allow the paramount title of a third person to be gone into or not, it cannot be said that it is a matter which might and ought to have been made a ground of defence or attack in the former suit In *Sonahannessa* v. *Abdul Hamid*[2], it is held that where in a mortgage suit the defendant possesses both the paramount title and an interest in the equity of redemption, he should not be allowed to rely on his paramount title and plead it, and that in a subsequent suit he can plead his paramount title and cannot be estopped from pleading it as the question would not be barred by *res judicata*. It follows in the light of the above discussion that the present plaintiffs claiming from the 4th defendant are not precluded from asserting their title to the entire 3/4th share in the eastern portion of the plaint scheduled property under the Court auction purchaser whose rights as a purchaser were outside the controversy in the redemption suit filed by defendants 1 and 2.

But then as it is nobody's contention that the Court auction purchase was free of prior encumbrance, the one kuruni comprised in the Court auction will be subject to the mortgage. When the plaintiffs acquired by their purchase the equity of redemption in this one kuruni, they themselves being the mortgagees, there was a merger of both the rights in the plaintiffs In the redemption suit which was decreed *ex parte* the Court ordered that all the defendants in the suit would be jointly entitled to draw the mortgage amount of Rs. 875 deposited for redemption. It is in these circumstances the plaintiffs in this suit have claimed declaration that they alone are entitled to draw the amount in deposit in the redemption suit. They have now impleaded all the persons who were made party defendants in the former suit, besides the plaintiffs in that suit. The third defendant had claimed in that suit that he was also a mortgagee, but as there was no contest then, the question was not adjudicated. Redemption was ordered in favour of all the defendants. It has since been found in the present suit that the third defendant has no right in the *otti* as mort-

1. (1927) 52 M L J 52 at 57. 2 A I.R. 1932 Cal 12.

gagee. He claimed to have purchased a 6/26th share of the *othi* right from some persons. But he has not established that his vendors were competent to convey the 6/26th share. It is in these circumstances, the trial Court has negatived the third defendant's claim to any share in the *othi* amount in O.S. No 989 of 1122 M.E. The appellate Court would hold that the present plaintiff's claim to draw the mortgage amount was barred by *res judicata* by reason of the decree in O.S. No. 989 of 1122 M.E. The learned Subordinate Judge does not discuss on what principle of *res judicata* the plaintiffs' claim for the amount is barred. The only reason given by the learned Subordinate Judge is that he had earlier held that the former suit is *res judicata*. It is not seriously contended before me so far as this part of the claim is concerned that there can be any *res judicata*. The parties were all co-defendants in the former suit and it was unnecessary to decide the controversy, if any, between them to give relief to the plaintiffs in the former suit and there has been no adjudication of the controversy between the defendant *inter se*.

It is contended for the respondents that at any rate the plaintiffs cannot now be permitted to draw the entire mortgage amount. They have failed in their contention that they were placed in possession of only three Kurunies under the *othi*. To this extent it may be said that the former judgment is *res judicata*. The *othi* was for 4 Kurunies and if by the Court auction purchase the present plaintiffs became entitled to one Kuruni of the property *othied*, there may be major (*sic*) but they will have to bear the proportionate burden of the *othi* debt They are bound to contribute their share of the mortgage debt even as their vendor, the 4th defendant, was bound to, it not having been made out that his purchase was free of the prior encumbrance. He was only a Court auction purchaser and had acquired the right, title and interest of his judgment-debtor and that was only the equity of redemption Counsel for both sides agree that this controversy may be resolved in this suit itself and the plaintiffs' right in the mortgage amount in Court deposit in O S No. 989 of 1122 M.E. may be limited to 3/4 of the amount. Such an order would only be making the plaintiffs contribute their share of the mortgage debt as they are bound.

In the result the decree and judgment of the lower appellate Court are set aside and the decree and judgment of the trial Court restored subject to the modification that in respect of the mortgage amount in deposit in O S. No. 989 of 1122 M E. the present plaintiffs can draw out only 3/4th of the amount. The plaintiffs in the fromer suit who make the deposit may draw out the balance. The Second Appeal is accordingly allowed. There will be no order as to costs. No leave.

V.K. ——— *Appeal allowed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE K. S VENKATARAMAN.

Shanmugham and others .. *Petitioners**

Criminal Trial—Prosecution under section 307, *Indian Penal Code—Magistrate holding that no offence exclusively triable by the Court of sessions made out—Revision to Sessions judge—Sessions judge holding*, prime facie *case under section* 307, *Indian Penal Code, made out—If should commit the accused to sessions straight away—If could order further enquiry*

In a prosecution for an offence under section 307, Indian Penal Code, being an offence exclusively triable by the Court of Session, the Magistrate holding the committal enquiry under section 207-A, Criminal Procedure Code, was of the opinion that no such offence has been made out but only an offence triable by a First Class Magistrate On a revision filed by the State the Sessions Judge felt that there was a *prima facie* case under section 307, Indian Penal Code But instead of straightaway committing the accused, as he could have done, the Sessions Judge directed further enquiry to be done as it was represented to him that some more prosecution evidence remained to be adduced before the Committal Court

Held, that the Magistrate exceeded his jurisdiction in taking upon himself the duty of weighing the evidence and holding that no case under section 307, Indian Penal Code, is made out The Sessions Judge, though he could have straightaway committed the accused, was not in error in directing further enquiry since some further prosecution evidence remained to be adduced

* Crl R C No 1546 of 1966
(Crl R P No 1514 of 1966.) 25th November, 1966.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order of the Court of Session, North Arcot Division at Vellore dated 4th October, 1966 and made in Crl.R P. No 1 of 1966 (P.R.C. No. 4 of 1965, Sub-Magistrate, Gudiyatham).

P. R. Gokulakrishnan and *B. Soundarapandiyan*, for Petitioners.

The Court made the following

ORDER.—This revision petition has been preferred by the 39 accused, against whom a charge-sheet was filed for offence of rioting and attempt to murder under section 307, Indian Penal Code, before the learned II Class Magistrate, Gudiyatham, in P.R C. No 4 of 1965. The offence under section 307, Indian Penal Code, being exclusively triable by the Court of Sessions, the Sub-Magistrate had to hold an enquiry under the provisions of Chapter XVIII of the Code, and since the proceeding was instituted on a police report, the procedure applicable was that under section 207-A, Criminal Procedure Code. The case against the accused was that they formed themselves into a unlawful assembly to attack the Police Station and murder the Sub-Inspector and others in connection with the anti-Hindi agitation. The learned Sub-Magistrate examined some witnesses and being of the opinion that no offence under section 307, Indian Penal Code, was made out, but only offences triable by a I Class Magistrate, submitted the papers to the I Class Magistrate. He apparently acted under section 207-A (6), Criminal Procedure Code.

Against this order the State preferred a revision petition to the learned Sessions Judge. The learned Sessions Judge felt that there was a *prima facie* case under section 307, Indian Penal Code, but, instead of straightaway committing the accused, as he could have done under section 437, Criminal Procedure Code, directed further enquiry to be done, because it was represented to him that some more prosecution evidence remained to be adduced It is against this order of the learned Sessions Judge that this revision has been filed

The order of the learned Sub-Magistrate discharging the accused has not been filed before me But it is clear from a perusal of the judgment of the learned Sessions Judge that the learned Sub-Magistrate exceeded his jurisdiction in discharging the accused in respect of the offence under section 307, Indian Penal Code Certainly, there was some *prima facie* evidence and therefore it was the duty of the Sub-Magistrate to order committment He should not have undertaken the task of weighing the evidence himself which was the province of the Sessions Court Normally, therefore, it would have been right for the learned Sessions Judge to order committment of the accused under section 307, Indian Penal Code, but the reason why he directed further enquiry was, as already stated, that some further prosecution evidence had to be adduced I do not see how the order can be said to be wrong.

Learned Counsel for the petitioners has however cited before me a decision of the Mysore High Court in *Abbas Beary* v *The State of Mysore*[1] That decision has no application to the present case That was a case where the police filed a charge-sheet under section 406, Indian Penal Code, before the Additional Munsif-Magistrate, and that Magistrate acting under section 251-A (2), Criminal Procedure Code, considered the charge against the accused to be groundless and discharged him. Under section 251-A (2), Criminal Procedure Code, he had only to consider the documents referred to under section 173 and examine the accused if he thought necessary and should give the prosecution and the accused an opportunity of being heard Aggrieved against that order, the State preferred a revision to the District Magistrate The learned District Magistrate, purporting to act under section 436, Criminal Procedure Code, directed the Magistrate to make a further enquiry, because the learned District Magistrate felt that there was *prima facie* material for a charge being framed Against that order the accused filed a revision petition in the High Court, and the question posed before the learned Judge was whether the District Magistrate was empowered under section 436, Criminal Procedure Code, to direct

1. (1964) M.L J. (Crl) 573 : A I R. 1965 Mys 35

the Subordinate Magistrate to hold a further enquiry, or whether the District Magistrate should have submitted the papers to the High Court under section 438, Criminal Procedure Code The question arose in that form, because under section 251-A (2) the Subordinate Magistrate had jurisdiction to discharge the accused if on a consideration of the document referred to in section 173 and examination of the accused, if any, and giving an opportunity to the prosecution and the accused of being heard, he felt that the charge was groundless. If he did not feel the charge to be groundless, he had to frame a charge under section 251-A (3) and once a charge was framed there could be no question of any further enquiry and the trial would begin. In other words, these is no provision in section 251-A, Criminal Procedure Code, for any enquiry apart from the procedure prescribed in section 251-A (2), Criminal Procedure Code, which in the opinion of Kalagate, J., did not contemplate any further enquiry, apart from the opportunity to be given to the prosecution and the accused to be heard. In those circumstances, Kalagate, J , was of the opinion that what had to be done on the learned District Magistrate differing from the learned Sub-Magistrate was that a charge should be framed, but the direction to frame the charge could be given only by the High Court and could not be given by the District Magistrate directing further enqury was illegal and futile. Apparently, the learned Judge implied that there was a contrast between the new procedure prescribed in section 251-A, Criminal Procedure Code, on a police report in a warrant case and the procedure prescribed with respect to a warrant case starting on a private complaint In the case of the latter, there would be scope for further enquiry and section 436, Criminal Procedure Code, could well operate not so in the case of a proceeding instituted on a police report.

It is unnecessary to consider whether I can agree with the above decision, as to which see *Jadeja Murvaji* alias *Bhurubhai Modi* v *The State of Gujarat*[1]. It is sufficient to say that the above decision does not apply to this case. It is not applicable to the present case because here we are concerned only with an enquiry under section 207-A and, as I have already pointed out, normally, the learned Sessions Judge could have straightaway committed the accused, but the reason why he ordered further enquiry was that some further prosecution evidence remained to be adduced The substantial point to be borne in mind is that the learned Sub-Magistrate exceeded his jurisdiction in taking upon himself the duty of weighing the evidence under section 307, Indian Penal Code.

In the result, there is no merit in this petition and it is dismissed

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT .—MR. JUSTICE P S. KAILASAM.

S Doraisami Mudaliar .. *Petitioner**

v.

Balasubramanyam, Election Officer, and member of the Scrutiny Committee of Uthukottai Co-operative Supervising Union, Uthukottai, Chingleput District and others .. *Respondents*

Madras Co-operative Societies Act (LIII of 1961), section 28 (1) (b) (1)—Scope—'Person' in section 28 (1) if includes a registered society

Section 28 (1) uses the word 'person' and not 'member' and the contention is that the word 'person' would not include a registered society, though it is a member Though most of the disqualifications mentioned in section 28 are applicable to an individual, it cannot be said that the word 'person' would not include a registered co-operative society, which is entitled to become a member of another society It appears that the word 'person' is used as it relates to an individual or a society eligible for being elected or appointed as a member of the Committee The word 'member' cannot be used in the context as the person becomes a member only after being elected to the Committee.

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1 (1964) 1 Crl L J 238

* W P No 4892 of 1965 5th December, 1966.

Though several of the clauses of section 28 (1) are applicable to individuals, there cannot be any obstacle in applying the disqualifications to registered co-operative societies wherever they are applicable

Thus, the disqualification mentioned in section 28 (1) (*b*) (*i*) would also attach itself to a registered co-operative society

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the proceedings of the Scrutiny Committee of the Uthukottai Co-operative Supervising Union (Chingleput District) for the election of a Director to the Kancheepuram Co-operative Central Bank Ltd., Kancheepuram, dated 24th December, 1965 and quash the said order and made therein.

T. R. Srinivasan, for Petitioner.

R. Rangachari, for Respondents 1 and 2.

K. Swamidurai, for 3rd Respondent.

The Court made the following

ORDER.—This petition is filed for the issue of a writ of *certiorari* calling for the records connected with the proceedings of the Scrutiny Committee of the Uthukottai Co-operative Supervising Union (Chingleput District) for the election of a Director to the Kancheepuram Co-operative Central Bank, Limited, Kancheepuram, dated 24th December, 1965 and to quash the said proceedings.

The petitioner is a member of the Uthukottai Co-operative Supervising Union The Conjeevaram Co-operative Central Bank, Limited, has a Directorate consisting of 24 members. A third of the Directors vacated their offices on 1st January, 1966, and one of the Directors, who retired, was from the Uthukottai Co-operative Supervising Union The Uthukottai Co-operative Supervising Union was called upon to elect another representative to the Board of Directors of the Conjeevaram Co-operative Central Bank, Limited. The representative to the Uthukottai Co-operative Supervising Union is to be elected from the several Co-operative Credit Societies affiliated to the Union The Kollanur Co-operative Credit Society, of which the petitioner is a member, is one such society. The petitioner filed his nomination as a delegate of the Kollanur Co-operative Credit Society to the Uthukottai Co-operative Supervising Union. The petitioner's nomination was rejected on the ground that the Kollanur Co-operative Credit Society was ' overdue ' to the Conjeevaram Co-operative Central Bank The rejection of the nomination of the petitioner is challenged as illegal and contrary to the provisions of the Madras Co-operative Societies Act, 1961, and the rules and by-laws of the Conjeevaram Co-operative Central Bank, the Uthukottai Co-operative Supervising Union and the Kollanur Co-operative Credit Society. Section 28 (1) of the Madras Co-operative Societies Act, 1961 (LIII of 1961) provides·

" (1) No person shall be eligible for being elected or appointed as a member of a committee if he—

(*a*) .. . .

(*b*) (i) is in default to the society or to any other registered society in respect of any loan or loans taken by him for such period as is prescribed in the by-laws of the society concerned or in any case for a period exceeding three months "

The only question that has to be decided is whether the disqualifiction on the ground of default by the society is confined to an individual member or to a Co-operative Society Certain provisions of the Act and the by-laws of the concerned societies may be referred to in this connection. Section 17 (1) provides:

" 17 (1) Subject to the provisions of section 18—

(*a*) any individual competent to contract under section 11 of the Indian Contract Act, 1872,

(*b*) any other registered society,

(*c*) the Government, and

(*d*) any body of persons whether incorporated or not and whether or not established by or under any law, if such body is approved by the Government in this behalf by general or special order, shall be eligible for admission as a member of a registered society "

It will be seen that under clause (*b*) of sub-section (1) to section 17 a registered society is eligible for admission as a member of another registered society Sub-section (2) prescribes how a person qualified for membership be admitted to the different kinds of co-operative societies Sub-section (3) provides that no member of a registered society shall exercise the rights of a member unless and until he has made such payment to the society in respect of membership or acquired such interest in the society as may be prescribed by the rules and the by-laws. The word 'member' in sub-section (3) would include a registered society and it is incumbent on the registered society to make such payment to the society in respect of the membership in order to enable it to exercise the right of a member. Section 18 enumerates various disqualifications for membership of a society. The clauses in the section are applicable to individuals and not to registered societies. Section 19 refers to the right of members to services by registered societies. Section 20 relates to expulsion of members. Section 21 (1) (*a*) relates to the right of members to vote. There can be no doubt that in this section the word 'member' would also include a registered society. Section 28 uses the word 'person' and not 'member' and the contention is that the word 'person' would not include a registered society, though it is a member. Though most of the disqualifications mentioned in section 28 are applicable to an individual, it cannot be said that the word 'person' would not include a registered co-operative society, which is entitled to become a member of another society. It appears that the word 'person' is used as it relates to an individual or a society eligible for being elected or appointed as a member of the Committee. The word 'member' cannot be used in the context as the person becomes a member only after being elected to the committee Though several of the clauses are applicable to individuals, there cannot be any obstacle in applying the disqualifications to registered co-operative societies wherever they are applicable. This conclusion is strengthened by a reference to section 28, sub-section (2) which provides that a member of the committee shall cease to hold office if he becomes subject to any of the disqualifications mentioned in sub-section (1) When a registered society is elected as a member, it becomes disqualified by any of the disqualifications mentioned in sub-section (1) namely by being in default to a registered society in respect of any loan or loans taken by it. When a default by a society would result in putting an end to the membership of the society, it cannot be contended that a default by a society would not be a disqualification for being elected to another society.

A perusal of several sections of the Act, the by-laws of the Conjeevaram Co-operative Central Bank and the Uthukottai Co-operative Supervising Union makes it clear that the disqualification is also attached to the registered co-operative society There are 27 directors in the Directorate of the Conjeevaram Co-operative Central Bank Of these 18 directors are elected from different Unions. Three directors are ex-officio Deputy Registrars One director is from a Weavers Society, one from Employers Co-operative Society, one from stores and two from share-holders It will thus be seen apart from five directors, two of whom represent the shareholders and three ex-officio Deputy Registrars, the others are from institutions Representation is to the various societies concerned and members from the executive of the societies are sent as delegates representing the societies. By-law 17 (3) of the by-laws of the Conjeevaram Co-operative Central Bank, Limited, provides that a delegate of a society affiliated to the Bank ceases to hold office on the supersession of the committee of such society. The by-laws also provide for the society removing a delegate and appointing another in his place. According to by-law 26, the General Body of the Bank shall consist of (1) individual members, (2) society members affiliated to the Bank, (3) the State Co-operative Bank, Limited, and (4) the State Government if they hold shares in the Bank. The by-law also provides that the Board of Management shall maintain a list of members on rolls of the Bank, who are qualified to vote at the general body meetings and shall bring such lists up-to-date thirty days before the meeting of the general body and that

it shall be the duty of the Secretary to supply copies of such lists to such of the members as desire to have them on payment of such fees as may be prescribed by the Board in this behalf and that the Register of members shall be closed 30 days prior to the date of the General Meeting According to this by-law, a list was prepared by the Uthukottai Co-operative Supervising Union, which showed that the Kollanur Co-operative Credit Society was a defaulter Reading this by-law, it is clear that the list of members on the rolls of the Bank would consist of the various societies and if the societies are in default they will not be qualified to vote The by-laws of the Uthukottai Co-operative Supervising Union also make the position clear By-law 10 of the Union provides that the members of the governing body shall be elected by the general assembly of the Union from among the delegates of affiliated societies An affiliated society is entitled to withdraw its delegate at any time and send another in his stead, and any delegate who is so withdrawn ceases to be a member of the governing body if he happens to sit on that body at the time of withdrawal The by-laws of the Conjeevaram Co-operative Central Bank, Limited, as well as the by-laws of the Uthukottai Co-operative Supervising Union, make it clear that the members is only a registered society which elects one or two amongst the executive as delegates to the Union I do not see any justification for holding that the disqualification in section 28 (1) (*b*) (*i*) does not attach itself to a registered society, which is a member As already stated, it is not disputed that the Kollanur Co-operative Credit Society was a defaulter. The rejection of the nomination of the petitioner, who was a delegate of Kollanur Co-operative Credit Society, is therefore right

In the result the petition is dismissed with costs Counsel's fee Rs. 150

V.K ——— *Petition dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE P. RAMAKRISHNAN, MR. JUSTICE R SADASIVAM AND MR. JUSTICE M NATESAN

The Collector of Customs, Madras .. *Petitioner**

v.

Kotumal Bhiiumal Pahlajani and others .. *Respondents.*

Constitution of India (1950), *Article* 20 (3)—*Protection under—Statements recorded by an enquiring officer under sections* 107 *and* 108 *of the Customs Act—If inadmissible in evidence*

Evidence Act (*I of* 1872), *section* 25—*Bar under—Statements recorded by a customs officer under sections* 107 *and* 108 *of the Customs Act—If inadmissible in evidence*

Criminal Procedure Code (*V of* 1898), *section* 162—*Statements made to an officer under the Customs Act —If inadmissible in evidence*

Customs Act (*LII of* 1962), *sections* 107 *and* 108—*Statements recorded under—Admissibility in evidence.*

To bring a statement recorded by an officer during enquiry within the prohibition of Article 20 (3) of the Constitution of India, the person concerned whose statement has been recorded must have stood in the character of an accused at the time be made the statement It is not enough that he may become an accused any time after the statement has been made Hence the bar under the Article will not apply to statements recorded from a person during an investigation by the Customs Official under sections 107 and 108 of the Customs Act at the time when the deponent did not stand in the position of an accused

(Principles of law explained—Case-law discussed)

Sharma v *Satish Chandra,* (1954) S C J 428 (1954) 1 M L J 680 A I R 1954 S C 300, foll

Neither an inquiry under section 107 nor an enquiry under section 108 of the Customs Act, 1962, can in any way, in substance or in law, be considered to be the same as an investigation into a criminal offence by an Officer-in-charge of a Police Station so as to attract the bar under section 25 of the Indian Evidence Act Hence statements made before an officer of the customs department in an enquiry under sections 107 and 108 of the Customs Act will be admissible in evidence The bar under section 162, Criminal Procedure Code, will not be attracted to such statements

* Crl R C No 1374 of 1965
(Crl R P No 1350 of 1965) 9th September, 1966.

(Powers and procedure for investigation under the Customs Act explained—Case-law discussed).

Badaku Joti Svant v *The State of Mysore*, (1967) M L J (Crl) 36, Foll

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order dated 30th October, 1965 of the Court of Session Madras Division, Madras, in S C No 13 of 1965

V. T. Rangaswami Iyengar for *K Ramaswami*, for Petitioner

S Govind Swaminathan for *G S Balasundaram*, *N Sivashanmugham*, *Pratap*, *C. Kothari*, *K Rangavajjula*, *S C Shaw*, *I Subramaniam*, *Askar Ali*, *C Soman* and *S Krishnmurthi*, for Respondents.

The Public Prosecutor, for State.

The petition came up for hearing before Ramakrishnan, J , in the first instance. The Court made the following

ORDER* —In view of the ultimate order which I propose to pass in this case, namely, for reference to an appropriately constituted Bench, I shall refer to the facts of this Revision Case as well as the arguments advanced therein briefly

A complaint was laid by the Collector of Customs, Madras, against ten persons for offences under section 120-B of the Indian Penal Code (Conspiracy) read with section 135 of the Customs Act, 1962 (Central Act LII of 1962) (concerning smuggling of prohibited goods including possession, knowing or having reason to believe them to be smuggled and therefore liable to confiscation), under sections 23 (1) (A) and 23 (B) of the Foreign Exchange Regulation Act and under rule 131-B of the Defence of India Rules (illegal possession of gold). The complaint arose out of an incident which involved transport from Bombay to Madras of 750 bars of gold each weighing 10 tolas, whose value would exceed Rs. 7 lakhs It was alleged that out of these, 700 bars were brought in a car from Bombay to Bangalore in the first instance where the car broke down and then another car was engaged Ultimately the gold was brought to Hotel Woodlands, Royapettah, Madras, and stored in Room No 32. The Customs Officers on receiving information, kept a watch on the aforesaid room, which was found locked Accused 3 and 4 were traced in a room in Hotel Dasaprakash, Madras, and were questioned at that hotel by the Customs Officers Nothing incriminating was found in the room in the latter hotel But on a search of the room in the Woodlands Hotel, 700 bars of gold were recovered from under a matress on a cot. Statements were recorded from accused 3 to 9, by P.W 1, Inspector of Customs, and also by some other Customs authorities A complaint was filed by the Collector of Customs After a preliminary enquiry, the Second Presidency Magistrate, George Town, committed the accused to take their trial at the City Sessions Court, Madras, after discharging accused 4. In the committal order, the Magistrate confined the charges to the transaction in connection with the 700 bars of gold, as in his opinion the transaction in regard to the 50 bars was a distinct one.

Thereafter 17 charges were framed on 29th October, 1965 by the learned Sessions Judge against 9 accused persons for the various offences mentioned above. A Special Public Prosecutor was engaged to appear for the Collector of Customs, and the accused were represented by a number of Counsel When the hearing before the Sessions Court commenced, the prosecution wanted to file the statements recorded by the Customs Officer, P W 1 from the several accused persons Certain preliminary objection were raised by the accused's Counsel, to the admissibility of these statements in evidence It was urged firstly that the Officer of the Customs Department, who recorded the statements, must be deemed to be a Police Officer and that since the statements were of a confessional nature, they could not be admitted in evidence under section 25 of the Indian Evidence Act .The second

* 1st February, 1965

objection was that the investigation conducted by the Customs Officer must be deemed to be under Chapter XIV read with section 5 (2) of the Criminal Procedure Code, and therefore the statements would be inadmissible under section 161 read with section 162 of the Criminal Procedure Code The third objection was based on Article 20 (3) of the Constitution of India, that no person accused of any offence shall be compelled to be a witness against himself In regard to this last mentioned preliminary objection, I find no reference to it in the order of the learned Sessions Judge. But it was urged before me by learned Counsel Sri S. Govind Swaminathan appearing for some of the respondents in this revision, that this ground was also urged in the lower Court, but that no finding was given by the lower Court on that objection. But since it was a substantial point of law, I permitted him to urge that objection also before this Court, for supporting the lower Court's order.

The learned Sessions Judge upheld the first two objections, mentioned above and held that the statements given by the accused persons to the Customs Officer could not be received in evidence Against this order, the Collector of Customs, Madras, the complainant in the case, has filed this revision case to this Court challenging the order of the Sessions Judge.

I will take up for consideration first the last of the points mentioned above because primarily it is that point which has necessitated the reference to a Bench. As mentioned already, this revision case was filed by the Collector of Customs in this Court because he felt aggrieved by the order of the Sessions Court refusing to mark in evidence the answers given by accused 3 to interrogatories supplied to him by P.W. 1, a Gazetted Officer of the Customs Department, during an enquiry under section 107 of the Customs Act of 1962 Whereas section 107 refers to an 'enquiry' by a Customs Officer of gazetted rank, and this latter 'inquiry' under section 108 appears to be more formal than the former 'enquiry' mentioned in section 107; but so far as the present proceedings are concerned, the principles involved are common to both section 107 and section 108. The terms of section 108 of the Customs Act and section 171-A of the Sea Customs Act are substantially identical Section 108 makes it further clear that the power of issuing summons to give evidence or produce a document in an enquiry made in connection with the smuggling of goods, has to be exercised by a Gazetted Officer of the Customs Department Section 108 (4), just as section 171-A (4), prescribes that the enquiry shall be deemed to be a judicial proceeding, within the meaning of section 193 and section 228 of the Indian Penal Code The petitioner is apprehensive that unless an order is obtained at this stage correcting the decision of the lower Court, a similar interdiction would be placed in regard to statements of other accused also given during the aforesaid enquiry under section 107 and further that these statements are very material for the disposal of the Sessions Case.

Learned Counsel Sri Govind Swaminathan appearing for the respondents-accused before me in addition to supporting the finding of the lower Court on the first two objections mentioned above, urged that in any event these statements would be hit by Article 20 (3) of the Constitution of India which states that no person accused of any offence shall be compelled to be a witness against himself. He referred to the observation of a Bench of this Court in *Rainbow Trading Co.* v *Assistant Collector of Customs*[1]. That case arose out of an enquiry under section 171-A of the Sea Customs Act of 1878 The appellant who was suspected to have imported goods through the customs under a misdescription of the items in the licence, was summoned to give evidence and produce relevant documents relative to the imports of the goods in question The appellant declined to give evidence and when he was warned by the department that failure to comply with the summons would entail prosecution, he filed an appeal to the Collector of Customs, then in a revision to the Central Government and on failing at these stages, he applied to the High Court by means of a Writ Petition under Article 226 of the Constitution He urged in his support that section 171-A of the Sea Customs Act in so far as it compelled a person to give evidence at the enquiry held thereunder, was *ultra vires* as offending

1. (1965) 1 M.L.J. 465 I.L.R (1964) 1 Mad 451 A I R 1963 Mad 434.

Article 20 (3) of the Constitution, as well as Article 14 of the Constitution Balakrishna Ayyar, J, repelled these contentions and dismissed the Writ Petition Then the appellant preferred an appeal to a Bench of this Court The Bench held that the enquiry under section 171-A did not contravene Article 14 of the Constitution and confirmed the decision of Balakrishna Ayyar, J Thereafter, the learned Chief Justice Ramachandra Iyer observed (at page 441).

"It is argued that if it were to be recognised that there is no prohibition against compelled testimony in proceedings under the Customs Act, the guarantee under Article 20 (3) itself, would become illusory as the confession can be obtained first under section 171-A of the Sea Customs Act and then used for a prosecution We cannot agree that it would be so If for example a smuggler gives himself away during an examination under section 171-A that evidence will nevertheless constitute a compelled testimony and can neither be relied on nor used against him in any criminal prosecution, as Article 20 (3) will prevent it from being so used So much can be taken as settled by *Shri M P Sharma* v *Shri Satish Chandra*[1] Therefore any incriminating answers which a person examined under section 171-A may give, can only be used for the purpose of the departmental punishment and not for a prosecution in a criminal Court"

The other learned Judge who participated in the Bench decision, Anantanarayanan, J, concurred with this view and expressed himself at page 449 of the report in the following way:

"In the instant case, it cannot be said that the protection can be invoked to justify the appellant in declining to appear before the authorities, at the stage of the enquiry itself, and to state facts within his knowledge In other words, it is distinctly at a premature stage that the protection has been claimed for the appellant Of course, it is a heavy and true objection that the testimony thus compelled in the guise of proceedings under section 171-A of the Sea Customs Act, might be a later utilised to prosecute the appellant, and thus effectively divest him of the protection of Article 20 (3) by taking two steps, instead of one The answer to this objection has been clearly demonstrated, if I may say so with respect, by my Lord, the Chief Justice, such compelled testimony cannot be later relied on or used in a criminal prosecution, as at that stage, the protection of Article 20 (3) will be available to the appellant"

Relying on the observations mentioned above, learned Counsel Sri Govind Swaminathan for the respondents, urged that the statement recorded from the accused persons in this case during the section 107 enquiry, cannot be used in the criminal prosecution now pending against them by reason of the bar under Article 20 (3) of the Constitution.

Learned Counsel Sri V T Rangaswami Iyengar, arguing *contra* represented that the two observations mentioned above are based upon the decision of the Supreme Court in *Sharma* v *Satish Chandra*[1], where the following observation is found at page 430 of the report:

"The fundamental guarantee in Article 20 (3) comprehends within its scope not merely oral testimony given by an accused in a criminal case pending against him, but also evidence of whatever character compelled out of a person who is or is likely to become incriminated thereby as an accused It, therefore, extends not only to compelled production of document by an accused from his possession, but also to such compleled production of oral or documentary evidence from any other person who may become incriminated thereby as an accused in future proceedings"

The reference in the above two sentences, to a future state of affairs, apparently led to the view expressed by the two learned Judges extracted above in the Bench decision of this Court. But the Supreme Court in another decision given by eleven Judges and reported in *State of Bombay* v *Kathi Kalu*[2], held the view that the observations in *Sharma* v. *Satish Chandra*[1], covered a much wider field than what the facts of that case warranted. (The impugned statement in that case was given after the First Information Report had been laid against the person making the statement) and therefore the entire scope of Article 20 (3) of the Constitution was considered afresh by the Supreme Court and re-interpreted under seven items of findings of which item 7 which is relevant for our purpose is in the following terms (at page 1817):

"(7) To bring the statement in question within the prohibition of Article 20 (3) the person accused must have stood in the character of an accused person *at the time he made the statement* It is

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1 (1954) 1 M L J 680 (1954) S C J 428 A I R 1954 S C 300

2 (1963) 1 S C J 195 (1963) M L J (Crl) 97 A I R 1961 S C 1963

not enough that he should become an accused, any time *after* the statement has been made (italics mine) "

It does not appear from the judgment of the Bench of this Court in *Rainbow Trading Co.* v *Assistant Collector of Customs*[1], that the attention of the learned Judges was drawn to the later judgment of the Supreme Court by 11 judges re-interpreting the scope of Article 20 (3) of the Constitution Learned Counsel Sri V. T. Rangaswami Iyengar for the petitioner referred to a Bench decision of the Bombay High Court reported in *Laxman Padma* v. *State*[2], where the Bombay High Court has noted the further clarification by the later decision of the Supreme Court on the scope of Article 20 (3) of the Constitution, modifying the view in *Sharma's case*[3] Differing from the Madras High Court's view, the Bombay High Court came to a diametrically opposite conclusion which is stated at page 216 of the report, to the effect (and observed) that a person examined under section 171-A does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time and that the fact that subsequent to the making of the statement he becomes an accused person is not sufficient to bring the statement within the mischief of Article 20 (3) of the Constitution

Again, the Supreme Court in *Narayanlal* v *M P. Mistry*[4], dealt with a case which arose under the Companies Act. Certain observations therein as to the stage at which an incriminating statement can be considered as outside the purview of Article 20 (3) of the Constitution will be relevant, *viz* ,

> " At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against any one that he has committed an offence In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20 (3) of the Constitution "

In view of the foregoing subsequent decisions and in particular in view of the fact that the Bench decision appears to have relied upon *Sharma's case*[3], and the later decision of the Supreme Court in *State of Bombay* v. *Kathi Kalu*[5], was not brought to the notice of the learned Judge, learned Counsel for the respondents urges that the observations of the Bench in *Rainbow Trading Co* v. *Assistant Collector of Customs*[1], may require reconsideration I am in agreement with this view and subsequently I direct this revision case to be placed before the Honourable the Chief Justice for disposal, if necessary, by a larger Bench duly constituted for that purpose.

I will next refer to the arguments by the learned Counsel for the petitioner on the first and second objections mentioned earlier in this order. The first objection arises out of the much discussed question of the application of section 25 of the Indian Evidence Act. There were statements of accused persons recorded by an Enquiring Officer who may not be strictly a Police Officer within the meaning of the Police Act (which too however does not define who a Police Officer is) but who may be, by a special law, either deemed to be a Police Officer for the purpose of investigation into offences under special laws or empowered also by a special provision to exercise the powers of investigation conferred on Police Officers in Chapter XIV of the Criminal Procedure Code The decisions given on this question have arisen in the context of several special laws In *State of Punjab* v *Barkat Ram*[6], the question arose out of an investigation under the Land Customs Act, 1924, whose terms were similar to the Sea Customs Act, 1878. There was no provision in the Sea Customs Act as well as in the Land Customs Act and also in the Customs Act, 1962, either deeming Customs Officers as Police Officers for the purpose of investigation into smuggling offences or specifically giving them powers of investigation conferred on an Officer-in-charge of the Police Station under Chapter XIV of the Criminal Procedure Code So, their Lordships had to deal with a question how

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1 (1965) 1 M L J 465 I L R (1964) 1 Mad 451 A I R 1963 Mad 434

2 A I R 1965 Bom 195

3 (1954) S C J 428 (1954) 1 M L J 680 A I R 1954 S C 300

4 (1961) 1 An W R (S C) 73 (1961) 1 M L J (S C) 73 (1961) M L J (Crl) 208 : (1961) 1 S C J 353 A I R 1961 S C 29 at 39.

5 (1963) 1 S C J 195 (1963) M L J. (Crl) 97 A I R 1916 S C 1808

6 A I R 1962 S C 276

far the fact that certain wide powers of investigation into offences contravening the provisions of the Land Customs Act (Sea Customs Act) would make them Police Officers so as to attract the bar of section 25 of the Indian Evidence Act to the statements recorded by them While dealing with this question, their Lordships extracted a list of the powers of investigation mentioned in the several sections of the Land Customs Act (Sea Customs Act) and held that they would not make the Customs Officers, Police Officers for the purpose of section 25 of the Evidence Act. But they qualified their observations by the statement that they did not express any opinion on the question whether the officers of departments other than the police on whom the powers of an Officer-in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure have been conferred are Police Officers or not for the purpose of section 25 of the Evidence Act.

The last mentioned point came up for decision in a later judgment of the Supreme Court reported in *Raja Ram* v. *State of Bihar*[1]. That case arose under the Bihar and Orissa Excise Act, 1915, which had a provision under section 78 (3) to the effect that any Excise Officer empowered under section 77 (2) of that Act shall, for the purpose of section 156 of the Code of Criminal Procedure, be deemed to be an Officer-in-charge of a Police Station with respect to the area to which his appointment as an Excise Officer extends Section 156 of the Criminal Procedure Code gives powers to an Officer-in-charge of a Police Station to investigate into cognizable offence without the order of a Magistrate Therefore, the Supreme Court pointed out that from these provisions it would follow that an Excise Inspector or Sub-Inspector in Bihar shall be deemed to be an Officer-in-charge of the Police Station and is in that capacity entitled to investigate any offence under the Excise Act within that area without the order of a Magistrate. They, therefore, held that a confession recorded by him during an investigation into an excise offence cannot reasonably be regarded as anything different from a confession to a Police Officer They also pointed out the distinction between the Bihar and Orissa Excise Act and the Sea Customs Act into two respects, one was that the former does not exercise any judicial powers just as the Customs Officer under the Sea Customs Act and the second was that the Customs Officer is not deemed to be an Officer-in-charge of a Police Station and therefore can exercise no powers under the Criminal Procedure Code, and certainly not those of an Officer-in-charge of a Police Station.

Both before and after the Supreme Court decisions referred to above, there have been decisions dealing with special or local laws cases where the scope of section 25 of the Act has come in for interpretation, in the context of special provisions in the Act granting to investigating officers the powers of an Officer-in-charge of a Police Station for the purpose of investigation. They are. *Public Prosecutor* v *Paramasivam*[2] (Opium Act), *Nanoo Sheik Ahmed* v *Emperor*[3] (Bombay Abkari Act), *Amin Sharif* v *Emperor*[4] (Bengal Excise Act) and *Someshwar* v *H. Shelat*, In re[5], (Hoarding and Profiteering Prevention Ordinance). There are parallel set of decisions where, in the absence of a provision in the special enactments investing the Investigating Officer with the powers of investigation of an Officer-in-charge of a Police Station, the statement made to such an Investigation Officer was held to be not hit by section 25 of the Evidence Act. They are. *Venkata Reddi* v *State*[6], (Prohibition Act), *Vadivel Goundar* v *State*[7], (Prohibition Act) and *Srinivasa Narasimha Bavanaker* v *State*[8] (Prohibition Act). Relying on these decisions learned Counsel Sri V. T Rangaswami Iyengar appearing for the petitioner urged that in the absence of any specific provision in the Customs Act, 1962 investing the Customs Officers with the powers of investigation of an Officer-in-charge of a Police Station and in view of the conferment on such

1 A I R 1964 S C 828

2 (1953) M W N 129 (Crl.) (1953) 2 M L J. 189 I L R (1954) Mad 57

3 I L R (1927) 51 Bom 78 A I R 1927 Bom 4

4. I.L R (1934) 61 Cal 607

5 (1946) M W.N (Crl.) 47 (1946) 1 M L J. 368

6 (1947) M W N (Crl) 120 I L R (1948) Mad 574 (1947) 2 M L J 218

7 (1952) M W N (Crl) 5 (1952) 1 M L J. 69

8 (1954) M W N (Crl.) 187.

officers of quasi-judicial powers which no Police Officer-in-charge of a Police Station enjoys, the view of the lower Court that section 25 of the Indian Evidence Act would apply to the statements is erroneous.

Sri Govind Swaminathan for the respondents does not dispute the proposition that there is no provision in the Customs Act, 1962 which invests the Enquiring Officers under that Act, with the powers of investigation of an Officer-in-charge of a Police Station But he supplied to me a tabular statement giving a list of powers given to Enquiring Officers under several enactments like Sea Customs Act, 1828, Madras Excise Act, Indian Opium Act and finally the Customs Act, 1962. According to him, an examination of these powers would show that in the latest enactment, namely, Customs Act, 1962, such wide powers of search, seizure, interrogation for oral testimony, summon to produce documents, arrest, grant of bail are conferred upon the Officers of the Customs Department, that they, exercise, in substance, the powers of an Officer-in-charge of a Police Station for the purpose of investigating into offences arising out of the provisions of the Customs Act, 1962, and therefore, notwithstanding the absence of a deeming provision in the Customs Act, 1962, since they in substance exercise the powers of a Police Officer, section 25 would interdict their statements from being received in evidence. In particular, learned Counsel refers to section 104 (4) of the Customs Act, 1962 which makes all the offences under the new Act non-cognizable. The effect of this provision is that no Police Officer can investigate offences under the Customs Act notwithstanding the fact that being punishable with imprisonment for a period of more than two years (section 135 (*b*) (i) prescribes a sentence of five years) they would be normally cognisable bearing in mind the provision in Schedule I to the Criminal Procedure Code under the heading " Offences against other laws". In the order now under revision the learned Sessions Judge observed that the decision in *Raja Ram* v *State of Bihar*[1], laid down two dominant tests for deciding whether a Customs Officer can be considered to be a Police Officer with reference to section 25 of the Indian Evidence Act According to the learned Judge they would be (1) It is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise, and (2) Whether such powers establish a direct or substantial relationship with the prohibition enacted by section 25, that is, the recording of a confession. In other words, whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. These tests are no doubt stated in the decision in *Raja Ram* v. *State of Bihar*[1]. Learned Counsel Sri V T. Rangaswami Iyengar, for the petitioner argued that the application of these tests cannot be divorced from another equally significant requirement that the Enquiring Officer who exercises those powers must have been conferred under the specific terms of the special law with the powers of an Officer-in-charge of a Police Station or under terms with (what is to be) a similar purport for the purpose of investigation into offences under the special law. In my opinion, this argument has considerable force because, the observations in the decision in *Raja Ram* v. *State of Bihar*[1], must be read in the context of the Bihar Excise Act under which it was given, and to which I have already made reference In fact, no decision has been cited before me, where divorced from any such deeming provision, and solely by the examination of the totality of the powers of investigation granted to an officer under a special or local law statements recorded by him have been excluded under section 25 of the Evidence Act No doubt he may be a person in authority and he might have applied coercion or influence to extract statements so as to attract the bar under section 24 of the Indian Evidence Act. But that is not the question for consideration in the present case. It is equally significant that in the decision in *Raja Ram* v. *State of Bihar*[1], the Excise Officer exercising the powers of investigation had no judicial power while in the Customs Act, 1962, as prominently as it was in the earlier Sea Customs Act, the Customs Officer is given judicial powers for deciding the culpability for contravention of the smuggling laws and imposing appropriate penalties for such contravention including confiscation and fine. In fact, section 171-A

1. A.I.R. 1964 S.C. 828.

(4) treats the proceedings as a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code However, in view of the fact that I am referring one other question arising out of this, namely, the one under Article 20 (3), to a Bench, this objection dealt with in the foregoing paragraphs may also be dealt with by the Bench constituted for the purpose because of the importance of the question involved, the frequency with which it may arise in future cases under the Customs Act, 1962, and the necessity to obtain an authoritative decision of a Bench which will be of help to authorities as well as subordinates dealing with the question in future. Therefore, without expressing my final view on this point, I will also refer it for adjudication by a Bench.

The second objection raised in the lower Court against the admissibility of the statement was based upon section 162 of the Criminal Procedure Code. This prohibits the receipt of, as evidence in Court, all statements recorded by a Police Officer in the course of investigation under Chapter XIV of the Criminal Procedure Code. According to the learned Counsel for the respondents section 5 (2) of the Criminal Procedure Code states that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences, but in the Customs Act, 1962, we have a special law which amounts to a self-contained code for the purpose of holding an enquiry under that Act, and further Chapter XIV of the Criminal Procedure Code where section 162 is found, in terms refers to the procedure for investigation by an Officer-in-charge of a Police Station, in respect of cognisable offences As against this, it is pointed out by the learned Counsel for the petitioner, that section 104 (4) of the Customs Act, 1962, makes all offences under the new Act non-cognizable, thereby excluding the jurisdiction of Police Officers to investigate such offences and also would exclude the application of section 162 of the Criminal Procedure Code In view of my referring the other two points for decision to the Bench, and since this point is closely allied to the first objection mentioned above, this objection also will be placed for decision by the Bench The points for decision are therefore : Are statements recorded by enquiring officers of the Customs Department under section 107 (108) of the Customs Act, 1962 inadmissible in evidence in a criminal trial by reason of the bar under · (1) section 25 of the Indian Evidence Act; (2) section 162 of the Criminal Procedure Code ; and (3) Article 20 (3) of the Constitution

In pursuance of the said Order of Reference, the petition came up before a Full Bench (Ramakrishnan, Sadasivam and Natesan, JJ.)

The Opinion of the Court was pronounced by

Ramakrishnan, J *—The circumstances which led to this reference to a Full Bench of this Court have been set down in some detail, in the Order of Reference made by one of us, and it is not necessary to recapitulate them The point referred to our decision is :

"Are statements recorded by enquiring officers of the Customs Department under section 107 (108) of the Customs Act, 1962 inadmissible in evidence in a criminal trial by reason of the bar under (1) section 25 of the Indian Evidence Act , (2) section 162 of the Criminal Procedure Code , and (3) Article 20 (3) of the Constitution "

We will take up first for consideration, the question as to how far statements recorded by officers of the Customs Department under section 107 or section 108 of the Customs Act, 1962 (LII of 1962) would be hit, for the purpose of admissibility in evidence in a criminal trial by reason of section 25 of the Indian Evidence Act ; in other words, whether the officers of the Customs Department, investigating into a smuggling offence, can be considered to be Police Officers, within the meaning of section 25 of the Indian Evidence Act. Section 107 of Act LII of 1962 reads thus :

"*Power to examine persons.*—Any officer of Customs empowered in this behalf by general or special order of the Collector of Customs may during the course of any enquiry in connection with the smuggling of any goods,—

(*a*) require any person to produce or deliver any document or thing relevant to the enquiry ,
(*b*) examine any person acquainted with the facts and circumstances of the case "

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*9th September, 1966.

Section 108 reads thus:

"*Power to summon persons to give evidence and produce documents* –(1) Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct, and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required.

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code "

We propose to go into the scope and extent of the powers of investigation, conferred by the Customs Act of 1962, in some detail a little later in the judgment. But in the meantime it will be useful to set down the gist of the decisions bearing on the subject, to enable a proper appreciation to be made, of the provisions for investigation by Customs Officers contained in Act LII of 1962.

In *State of Punjab* v. *Barkat Ram*[1], the Supreme Court had to consider the effect of section 25 of the Evidence Act, on statements recorded by a Customs Officer either under the Land Customs Act, 1924 (XIX of 1924) or under the Sea Customs Act, 1878 (VIII of 1878), and whether the Customs Officer, under the two provisions last cited, in a Police Officer within the meaning of that expression in section 25 of the Indian Evidence Act. The relevant provisions for enquiry in the Sea Customs Act, 1878, was contained in section 171-A, whose terms were more or less analogous to those in section 108 of the Act of 1962, with the difference that of section 108 of the Act of 1962 refers to a gazetted officer. Section 107 of the Act of 1962 gives the power of investigation, to be conducted in a less formal manner, to an officer of the Customs Department specially empowered in that behalf, with the qualification that such an enquiry will not have the advantage of being considered to be a judicial proceeding as in the case of the inquiry under section 108 The majority of the Supreme Court comprising of Kapur and Raghubar Dayal, JJ, after making an analysis of the relevant provisions of the Sea Customs Act, held that the Customs Officer under the old Sea Customs Act, could not be considered to be a Police Officer for the purpose of section 25 of the Indian Evidence Act. They relied *inter alia* on the following special provisions in that Act: (1) The Act conferred on them powers to make search, powers to arrest and powers to record evidence, but these powers would not suffice to make them Police Officers as contemplated in section 25 of the Indian Evidence Act, even if one were to assume, as held by certain High Court's that officers on whom the powers of an Officer-in-charge of a Police Station under Chapter XIV, Criminal Procedure Code, have been conferred, were Police Officers for the purpose of section 25 of the Evidence Act, (2) The powers which the Police Officers enjoy, are powers for the effective prevention and detention of crimes in order to maintain law and order; but the powers conferred on Customs Officers are intended for the purpose of checking the smuggling of goods, the due realisation of customs duties, and to determine the action to be taken by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines in the interest, of the revenues of the country This would be clear from the preamble to the Sea Customs Act which states "whereas it is expedient to consolidate and amend the law relating to the levy of sea customs duties" The duties of Customs Officers are very much different from those of the Police Officers, though certain powers which they possess may have similarity with those of police powers, but those powers were intended for the purpose of detecting the smuggling of goods and the persons responsible for it, and they would not make the Customs Officers, Police Officers.

1. A I R. 1962 S C. 276.

(3) There are provisions in the Sea Customs Act which refer to a Police Officer in contradistinction to a Customs Officer. The said sections are section 118 and section 184. This circumstance also leaves no room for doubt that a Customs Officer is not an Officer of the Police. (4) A reference to the scope of the inquiry under section 171-A of the Act, and the powers conferred therein, and in particular the provision for treating the inquiry as a judicial proceeding, would show that the Legislature did not contemplate the treating of statements recorded by such officers on a par with the statement recorded by Police Officers during investigation under the Criminal Procedure Code ; because no proceeding before a Police Officer is taken to be a judicial proceeding for the purpose of section 193 and section 228, Indian Penal Code or for any purpose.

However, learned Counsel who appeared for the respondents herein, who are the accused in S.C. No. 13 of 1965, urged that the revised Customs Act, 1962 (LII of 1962) contains so many new provisions which confer extensive powers of investigation on Customs Officers, that the view laid down by the Supreme Court in *State of Punjab* v. *Barkat Ram*[1], in regard to the old Sea Customs Act, will cease to apply in the case of an investigation under the new Act. For this purpose, the learned Counsel supplied us with a comparative statement of the different provisions of the two enactments, and he also gave extracts of the relevant provisions from the Opium Act (I of 1878), the Bihar and Orissa Excise Act (II of 1915), the Central Excise and Salt Act (I of 1944). We will confine our attention to the parallel provisions of the old Sea Customs Act and the revised Act (LII of 1962) and refer to the other enactments in the particular context where such reference is necessary. First of all, the preamble to Act LII of 1962 states that it was an Act "to consolidate and amend the law relating to customs" The preamble to the old Customs Act has already been referred to earlier in this judgment. But the modification in the preamble of the new Act has little or no effect on the question we have to consider. All that the new preamble implies is that the Legislature intended to pass a consolidated Act for the purpose of dealing with matters affecting customs. The provisions which are practically analogous, in the old and new Customs Acts, can be considered under the categories of (1) power to arrest (section 173 of the old Act and section 104 (1) of the new Act), (2) power of search (section 172 of the old Act and section 105 (1) of the new Act), (3) the procedure after arrest (section 104 of the old Act and section 102 of the new Act), and (4) power to investigate (section 171-A of the old Act and sections 107 and 108 of the new Act). It is undeniable that there are differences in the wording used between the old rules and the new rules under the categories mentioned above, and we examined these provisions after setting them side by side so as to bring into greater focus the nature of those verbal alterations; but it is not necessary to extract them here, because it is common ground, that the substantial differences between the two enactments, are contained (i) in the procedure after arrest, (ii) in the procedure for investigation, and (iii) in the procedure for search.

In regard to the procedure for arrest, section 104 (3) of the Act of 1962, states that where an officer of Customs has arrested any person under sub-section (1) (if he has reason to believe that any person has been guilty of an offence punishable under section 135), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer in charge of a Police Station has, and is subject to, under the Code of Criminal Procedure, 1898. Section 104 (4) states that notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Act shall not be cognizable. Under the old Sea Cusoms Act, section 174 provided that every person, arrested on the ground that he has been guilty of an offence under this Act, shall forthwith be taken before the nearest Magistrate or Customs Collector, but there was no analogous provision in the old Act for the grant of bail by the Customs Officer himself.

In regard to the procedure for investigation, there was only a single provision in section 171-A of the old Act. It refers to an inquiry which is treated as a judicial

1. A.I.R. 1962 S C. 276.

proceeding and there was a direction that it should be conducted by an officer of customs, duty employed in the prevention of such smuggling. But in the new Act, the provision for investigation has been split up into two sections. Section 107 gives power to any officer of customs specially empowered in this behalf to hold an enquiry in connection with the smuggling of any goods; and for that purpose he can require any person to produce or deliver any document or thing relevant to the enquiry, and examine any person acquainted with the facts and circumstances of the case, but this enquiry involves no compulsion, and the enquiring officer cannot compel the attendance of witnesses, or compel them to produce documents, and no penalty is attached to the persons who fail to comply with a direction to attend to give evidence or to produce a document. But such an obligation, along with a penalty for non-compliance are provided in the case of an inquiry under section 108; such inquiry has to be made only by a gazetted officer; it is also deemed to be a judicial proceeding. A reference to the powers of investigation conferred on an officer in charge of a Police Station under Chapter XIV of the Code of Criminal Procedure can be made at this stage Section 160, Criminal Procedure Code states that the police officer has got power to require attendance before him of persons for examination, and section 161 provides that such a person shall be bound to answer all questions relating to the case put to him by the police officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture We may also add that section 104 (4) of the new Act, treats all offences under the Act as not cognizable. This would mean that the power of the police to investigate into any offence under the Act of 1962 would be excluded automatically whereas, if this provision had not been introduced, Schedule II of the Code of Criminal Procedure dealing with offences against other laws, would have given the police power to investigate into offences under the Sea Customs Act, if punishable with imprisonment for three years and above.

In regard to the power of search, there is an important variation in the new Act (section 105 (1)), because an Assistant Collector of Customs, or in any area on the frontier or the coast of India, an officer of customs specially empowered by name, can either make a search himself or authorise a search by another officer, without obtaining previously a search warrant from a Magistrate; but section 172 of the old Act required such a prior search warrant issued by a Magistrate, before a search can be conducted by a Custom Officer.

The question that is now pressed before us for consideration, is that the wider powers thus shown to have been conferred in the new Act on Customs Officers, would reveal an intention on the part of the Legislature, to treat them as police officers, within the meaning of section 25 of the Evidence Act. For this purpose, reliance is placed upon a later decision of the Supreme Court, in *Raja Ram Jaiswal* v. *State of Bihar*[1], wherein, the Supreme Court had to interpret certain provisions contained in the Bihar and Orissa Excise Act (II of 1915), and in particular, section 77 (2) and section 78, in the contact of section 25 of the Evidence Act. Section 77 (1) was in the following terms :

> "A Collector may without the order of a Magistrate, investigate any offence punishable under this Act which a Court having jurisdiction over the local area within the limits of the Collector's jurisdiction would have power to inquire into or try under the provisions of Chapter XV of the Code of Criminal Procedure, 1898, relating to the place of inquiry or trial."

Section 78 (3) of that Act provided that an Excise Officer empowered under section 77 (2) shall, for the purpose of section 156 of the Code of Criminal Procedure, *be deemed* to be an officer in charge of a Police Station, with respect to the area to which his appointment as an Excise Officer extends.

Their Lordships carefully point out, after making a reference to their earlier decision in *State of Punjab* v *Barkat Ram*[2], that they were examining a point which was left open in that decision, namely, whether officers of departments other than police, on whom the powers of an officer in charge of a Police Station under Chapter

1. A I R. 1964 S C 828. 2. A.I.R. 1962 S.C. 276.

XIV of the Code of Criminal Procedure, were conferred, were Police Officers or not for the purpose of section 25 of the Evidence Act. This would make it clear that in the later decision their Lordships were dealing exclusively with the interpretation of the Bihar and Orissa Excise Act of 1915, with particular reference to section 78 (3) contained therein, which terms are given above.

There are, in the course of the judgment in *Raja Ram Jaiswal* v. *State of Bihar*[1], certain observations which were relied upon by the Counsel for the respondents before us, and which were also pressed into service in the order of the Sessions Judge, for holding that the Custom Officer exercising powers of investigation under Central Act LII of 1962, is a Police Officer for the purpose of section 25 of the Evidence Act. Thus, at page 833 of the report, the learned Judges observed that for the purpose of determining as to who can be regarded as "police officer" for the purpose of section 25 of the Evidence Act the test is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise They make this position clear later on by remarking that the test will be to find out whether, such powers which are conferred on him, or which are exercisable by him, because he is deemed to be an officer in charge of a Police Station, establish a direct or substantial relationship with the prohibition enacted by section 25, Evidence Act, that is, the recording of a confession. Then they observe that the existence of the power to grant bail in an officer in charge of a Police Station, itself enables him to exercise authority over the arrested person and influence his conduct if he so wishes They also observe that a Customs Officer who seizes or confiscates an article suspected to be contraband, has to furnish on demand of the person in charge of the thing so seized, a statement in writing of the reasons for such seizure, and a similar obligation is enjoined on him to give reasons in the case of a person arrested by him but no such duty is cast upon a police officer seizing an article or arresting a person. But, after making these remarks, their Lordships have given the gist of the conclusions thus .

> "It is worthy of note that the powers of investigation into offences which a Police Officer enjoy are not conferred upon a Customs Officer It is the possession of these powers which enables Police Officers and those who are deemed to be Police Officers to exercise a kind of authority over the persons arrested which facilitate the obtaining from them statements which may be incriminating to the person making them . It is the power of investigation which establishes a direct relationship with the prohibition enacted in section 25 "

They also drew attention to the fact that one test of the investigation being analogous to the investigation conducted by a Police Officer under Chapter XIV of the Code of Criminal Procedure, would be the question whether the Officer is entitled to submit a report to a Magistrate under section 190, Criminal Procedure Code, with a view that cognizance of the offence be taken by the Magistrate. But section 187-A of the Sea Customs Act specifically provides that cognizance of the offence under the Sea Customs Act can be taken only upon a complaint in writing made by the Customs Officer.

In a recent decision of the Supreme Court in *Badaku Joti Swant* v. *The State of Mysore*[2], a Bench of five Judges of the Supreme Court dealt with a case of a prosecution under section 167 (21) of the Sea Customs Act (VIII of 1878) read with section 9 of the Land Customs Act (XIX of 1924). The Deputy Superintendent of Customs who made the investigation was also a Central Excise Officer as defined under the Central Excise and Salt Act (I of 1944). That Act contained a provision, section 21, the material part of which reads thus :

> "When any person is forwarded under section 19, to a Central Excise Officer, empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him
>
> (2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the Officer in charge of a Police Station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognisable case ·
>
> Provided that . ..."

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1. A.I.R. 1964 S.C. 828

2. (1967) M.L.J. (Crl.) 36.

It was pressed on their Lordships that because of the powers thus conferred on the Central Excise Officer, the statement recorded by him would be hit under section 25 of the Evidence Act, and the earlier decision of the Supreme Court in *Raja Ram Jaiswal* v *State of Bihar*[1] was relied on support Repelling this contention, their Lordships pointed out that it did not appear that a Central Excise Officer under the Salt Act, had the power to submit a charge-sheet under section 173 of the Code of Criminal Procedure, but he would have to make a complaint under clause (*a*) of section 190, if he wants a Mag strate to take cognizance of an off rce, and this circumstance would show that though under sub-section (2) of section 21, the Central Excise Officer has the powers of an officer in charge of a Police Station when investigating a cognizable case, that power was conferred only for the purpose of the inquiry under section 21 (1), but section 21 was in terms different from section 78 (3) of the B har and Orissa Excise Act, 1915. They observed that the B har and Orissa Excise Act, 1915, contained a specific provision, that the area to which an Excise Officer empowered under section 77 (2) is appointed shall be deemed to be a Police Station, and such Officer shall be deemed to be the officer in charge of such station. They pointed out that there could be an enquiry or investigation into the question of the commission of a criminal offence which can be conducted by officers of other departments, but that would not make them police officers for the purpose of section 25 of the Evidence Act, because "otherw se any person entrusted with investigation under section 202 of the Code of Criminal Procedure would become a Police Officer".

Their Lordships also pointed out that there had been in India two views, one a narrow view taken by the Patna High Court in *Radha Kishun Marwari* v *Emperor*[2] and a wider view following that of the Bombay High Court in *Nanoo Sheikh Ahmed* v. *Emperor*[3]. They reached the conclusion mentioned above on the footing that the broader view should be adopted, but they also added that a great deal had to be said *prima facie* for the narrow view, and that if the narrow view were to be adopted in the case before them, the specific provision in section 78 (3) of the Bihar and Orissa Excise Act, 1915, would make all the difference.

It is appropriate to point out in this connection, that the Central Excise and Salt Act (I of 1944) has a provision regarding bail, in proviso 3 to sub-section (2) of section 21, to the effect that if the Central Excise Officer was of the opinion that there was sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Mag strate having jurisdiction in the case, or forward him in custody to such Magistrate. It is submitted by Sri V.T. Rangaswami Iyengar, learned Counsel for the revision petitioner that this provision did not deter the learned Judges in their latest decision from holding that section 25, Evidence Act was not attracted in the case of an officer empowered to investigate under the Central Excise and Salt Act of 1944, and that therefore the observation regarding the powers to grant bail contained in the earlier decision of the Supreme Court, in *Raja Ram Jaiswal's case*[1] may not be a conclusive test. We are inclined to agree with this submission.

The position that emerges in the l ght of the above clar fication made in the latest decision of the Supreme Court in *Badaku Joti Swant* v. *The State of Mysore*[4], is that for the purpose of section 25 of the Evidence Act, it is important to find out whether the powers of investigation conferred on an Officer other than a Police Officer, in a particular enactment, have been defined by that Act itself, as the powers of invest gation conferred on the Pol ce Officer in charge of a Police Station, under Chapter XIV of the Code of Criminal Procedure, with the consequence that the report which he submits at the end of the investigation, to the Mag strate, will be a charge-sheet for the purpose of taking cognizance under section 190-B (1) (*b*) of the Code of Criminal Procedure by the Mag strate. Equally it will not be proper to pick out one or more of the powers conferred on the Officer, and refer to them alone for the purpose of determining whether section 25 of the

1. A I R 1964 S C 828.
2. A I R 1932 Pat 293
3. I.L R. (1927) 51 Bom. 78 . A.I.R. 1927 Bom 4.
4. (1967) M L J. (Crl.) 36.

Evidence Act is attracted or not, divorced from the broad question whether the power of investigation of a Police Officer, as such, is conferred by the enactment. Thus, the references to the power to grant bail, and the power to make an arrest or the power to seize articles on search, which are found in *Raja Ram Jaiswal* v. *State of Bihar*[1], must be considered only against the background of the power of investigation proper conferred by the enactment under consideration. It is only when such power of investigation has been rendered by the enactment, in fact as well as in law, the same as the powers of investigation of a Police Officer under Chapter XIV of the Code of Criminal Procedure, that section 25 of the Evidence Act will be attracted.

The splitting up of the provision for investigation into two sections, sections 107 and 108 in the new Customs Act of 1962, in our opinion, will not make any difference to the application of the principles above stated. Section 107 refers to an enquiry by a Customs Officer. As mentioned already, such enquiry does not have the attributes of a judicial proceeding unlike the inquiry under section 108. It also does not enable the Enquiring Officer to compel the attendance or production of documents or things, and the witnesses also cannot be compelled to speak the truth under penalty What section 107 contemplates is, therefore, a less formal and rigorous type of enquiry, by Customs Officers; whereas section 108 contemplates an enquiry which is almost parallel to the inquiry under section 171 of the old Sea Customs Act and is considered to be a legal proceeding But neither the enquiry under section 107 nor the inquiry under section 108 can in any way, in substance or in law be considered to be the same as an investigation into a criminal offence, by an officer in charge of a Police Station under Chapter XIV of the Code of Criminal Procedure, which is the primary test for the application of section 25, Evidence Act as laid down by the Supreme Court in the latest decision.

In view of the foregoing, we are of opinion that the statements in the present case do not become inadmissible by reason of section 25 of the Evidence Act. It consequently follows that they are also not hit by section 162, Criminal Procedure Code.

The question of the guarantee under Article 20 (3) of the Constitution being available to the statements in the present case, has arisen for consideration by this Full Bench, by reason of the fact that in an earlier Bench decision of this Court reported in *Rainbow Trading Co.* v *Assistant Collector of Customs*[2], the learned Chief Justice Ramachandra Iyer and Anantanarayanan, J , (as he then was) expressed certain opinions, which have been pressed into service in this case by the learned Counsel for the respondents-accused. The facts in that case can be briefly set out. The appellant, a merchant at Madras, had imported certain goods by a ship which arrived in Madras Harbour. There was a doubt entertained by the Customs Officers, as to whether the goods which he imported tallied with their description, in the import licence. Therefore, the Customs Officers called upon the appellant, to show cause why action should not be taken against him and the goods confiscated under section 167 (8) of the Sea Customs Act Thereafter the Assistant Collector of Customs issued summons to the appellant under section 171-A of the Sea Customs Act, asking him to give evidence and produce the relevant documents. The appellant refused to appear and give evidence, and relied upon Article 20 (3) of the Constitution for his defence. That Article of the Constitution states " no person accused of any offence shall be compelled to be a witness against himself". The appellant filed a writ in this Court under section 226 of the Constitution, for the issue of a writ of prohibition against the Assistant Collector of Customs, to prevent him from enforcing his attendance. There was, in the earlier notice issued to the appellant in that case, a direction that he should explain why the department should not move for a prosecution against him. During the pendency of the writ petition, this portion in the notice was withdrawn. The learned Judge, Balakrishna

1. A I R. 1964 S C 828
2 (1965) 1 M.L.J. 465 : I.L.R. (1964) 1 Mad. 451 : A I R 1963 Mad 434.

Ayyar, J., who heard the writ petition, observed that at the stage in which the proceeding was, no one was an accused person in any sense of the term,

" that the circuit of enquiry would in time become smaller, and the stage would be reached when there was a certain amount of suspicion against various persons; then the final stage is reached when the investigating authority considers that a particular person has committed an offence and decided to proceed against him in Criminal Court, it is at this stage that a person really becomes accused of an offence."

In view of the above considerations, the learned Judge held that the evidence which the appellant was asked to give, clearly referred to a stage anterior to the stage where he should be considered to be a person accused of an offence, and therefore the guarantee under Article 20 (3) of the Constitution would not apply to him, and the writ petition was dismissed

This view of Balakrishna Ayyar, J, was confirmed by the Bench of this Court in appeal. That view is also supported by several decisions under analogous provisions of other enactments. Thus in *Bhagwandas Goenka* v. *The Union of India*[1], a case which arose under the Foreign Exchange Regulations, their Lordships of the Supreme Court after referring to the earlier decisions including their decision in *M. P Sharma* v *Satish Chandra*[2] held that for invoking the constitutional right against testimonial compulsion guaranteed under Article 20 (3) there must be at the relevant stage a formal accusation against the party pleading the guarantee relating to the commission of an offence which may result in a prosecution. Their Lordships also observed that in the case before them, which arose under the Foreign Exchange Regulations, the stage would be reached when a show cause notice was issued (as against a prosecution) But in that particular case that stage had not been reached, and therefore it was held that Article 20 (3) would not apply

In the present case, the lower Court had not been required to consider whether the statements now under consideration were hit by Article 20 (3) of the Constitution. This question was raised only in the course of the hearing before us It appears that these statements were recorded following upon certain recoveries of consignments of gold, from certain persons, or from certain localities, in the course of an investigation under section 107 or section 108 of the Sea Customs Act, 1962 But it is conceded before us that at the time when the statements were recorded, the investigation had not reached the stage when particular persons had been accused of an offence, within the meaning of Article 20 (3) of the Constitution Therefore we hold that the constitutional protection thereunder cannot be availed of in respect of such statements.

However, in the *Rainbow Trading Company case*[3] after expressing the view which we referred to earlier upholding the decision of Balakrishna Ayyar. J, Ramachandra Iyer, C J, at page 441 of the report observed :

" It is argued that if it were to be recognised that there is no prohibition against compelled testimony in proceedings under the Customs Act, the guarantee under Article 20 (3) itself, would become illusory as the confession can be obtained first under section 171-A of the Sea Customs Act and then used for a prosecution We cannot agree that it would be so If for example a smuggler gives himself away during an examination under section 171-A, that evidence will nevertheless constitute a compelled testimony and can neither be relied on nor used against him in any criminal prosecution, as Article 20 (3) will prevent it from being so used So much can be taken as settled by *M P Sharma* v *Satish Chandra*[2] Therefore any incriminating answers which a person examined under section 171-A may give, can only be used for the purpose of the departmental punishment and not for a prosecution in a criminal Court In that case (*viz*) *M P Sharma* v *Satish Chandra*[2], as well as in the more recent case in the *State of Bombay* v *Kathi Kalu*[4], it has been expressly held that the protection guaranteed under Article 20 (3) would comprehend both oral and written statements A record of evidence of a person obtained under section 171-A of the Sea Customs Act cannot be used against him at trial if he were to be charged in the criminal Court "

Anantanarayanan, J. (as he then was), at page 449 of the report, observed:

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1 Crl A Nos 131 and 132 of 1961

2 (1954) 1 M L J 680 (1954) S.C J 428 (1954) S C R 1077 A I R 1954 S C 300

3 (1965) 1 M L J 465 I L.R (1964) 1 Mad 451 : A I R 1963 Mad 434

4 (1963) 1 S C J 195 (1963) M L.J. (Crl) 97 : A I R 1961 S C. 1808.

"Of course, it is a heavy and true objection that the testimony thus compelled, in the guise of proceedings under section 171-A of the Sea Customs Act, might be later utilised to prosecute the appellant, and thus effectively divest him of the protection of Article 20 (3) by taking two steps, instead of one. The answer to this objection has been clearly demonstrated, if I may say so with respect, by my Lord, the Chief Justice, such compelled testimony cannot be later relied on or used in a criminal prosecution, as, at that stage, the protection of Article 20 (3) will be available to the appellant This fully disposes of the argument or objection upon this ground"

Learned Counsel Sri Govind Swaminathan for some of the respondents and also the other Counsel who appeared along with him for the other respondents relied upon these observations, and contended that even if the statements of the respondents recorded during the enquiry under section 107 or 108 are not hit by Article 20 (3) of the Constitution, because at that time the persons did not stand as accused persons, at the present trial where they are standing as accused persons, they could rely upon the guarantee under Article 20 (3) of the Constitution and insist upon the exclusion of such evidence. It is submitted by Sri V. T. Rangaswami Iyengar, learned Counsel for the petitioner herein, that the above observations of the two learned Judges in the *Rainbow Trading Company case*[1], require reconsideration for two reasons: one is that the decision of the Supreme Court in *Sharma's case*[2] does not give any authority for such a view; secondly a later decision of 11 Judges of the Supreme Court reported in *State of Bombay* v. *Kathi Kalu*[3], has set down certain principles, and if they are taken into account the statement of the law extracted above, by the two learned Judges in the *Rainbow Trading Company case*[1], will require reconsideration.

In the first place, it appears to us that where evidence is given at a trial, regarding prior statements of a confessional nature given by the accused, it is not a case of the accused person being compelled to be a witness against himself. In such circumstances the accused is not giving evidence, it is another person who appearing as a witness gives evidence regarding what the accused told him at an anterior occasion, when the accused did not stand in the position of an accused facing a trial for a criminal offence. What is involved in such a situation is the application of the principle enunciated in section 21 of the Evidence Act which lays down that admissions are relevant and may be proved as against the person who makes them or his representative in interest.

In *M P. Sharma* v. *Satish Chandra*[2], their Lordships of the Supreme Court observed that the gurantee under Article 20 (3) of the Constitution would be available to any compulsory process or *production* of evidentiary documents, which are reasonably likely to support the prosecution against the accused. But they held that the search or seizure of a thing or document cannot be treated as compelled production of the same. From the last-mentioned reasoning, they concluded that searches during the course of the investigation even of the premises of the accused will not be violative of Article 20 (3). Then they made certain observations to the following effect at 1087 and 1088:

"A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes .. The phrase used in Article 20 (3) is 'to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him."

Had the above observations concluded with the last cited remark, it might perhaps be claimed that the Supreme Court was contemplating also the exclusion of a confessional statement previously obtained from the accused person, for being used in evidence against him at the subsequent trial; but the immediately following sentence:

"It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution"

1. (1965) 1 M L J 465: I L R. (1964) 1 Mad 451: A.I R. 1963 Mad. 434.
2. (1954) 1 M.L.J. 680: (1954) S.C.J. 428: (1954) S C R. 1077: A I.R. 1954 S.C. 300.
3. (1963) 1 S C J. 195: (1963) M.L.J. (Crl) 97: A.I.R. 1961 S.C. 1808.

will show that their Lordships were having in mind only the exclusion of compelled testimony at a stage when the person giving such compelled testimony or whose compelled testimony in the shape of a document is being obtained, stands *at that time* in the position of an accused There appears to be no basis in that decision for inferring that the Supreme Court contemplated that the guarantee under Article 20 (3) will be available to the accused at a subsequent stage of a trial, even if that guarantee was not available to him at the time, when the impugned "testimony" was given at an anterior stage. The Supreme Court, in a later decision in which 11 Judges took part—*State of Bombay* v. *Kathi Kalu*[1], differed from the observations in *Sharma* v. *Satish Chandra*[2], in so far as they gave a wider connotation to the meaning of " to be a witness " in Article 20 (3) of the Constitution ; they held that the data gathered by obtaining the thumb-impressions or by the handwriting of a person or by exhibiting parts of his body for the purpose of identification, cannot be included within the scope of the expression " to be a witness ". This apart, if any doubt could be entertained in regard to the views of the Supreme Court in *Sharma's case*[2], on the specific question that has arisen for consideration now before us, the later decision clearly laid down at page 1817 of the report, as item 7 out of a set of 7 conclusions arrived by them in the following terms :

" To bring the statement in question within the prohibition of Article 20 (3), the person accused must have stood in the character of an accused person at the time he made the statement It is not enough that he should become an accused, any time after the statement has been made. "

Therefore, if at the trial evidence, is afforded, for example, of the prior thumb-impressions taken by the accused during investigation or of a prior identification parade, it will become admissible in evidence because while giving the thumb-impression or submitting himself to the identification, the accused cannot be considered to be acting as a witness against himself. Secondly, if a prior statement is given by a person at a time when he did not stand in the position of an accused, the guarantee under Article 20 (3) of the Constitution will not be available, if that statement is to be used as evidence against him when he is arraigned as accused at a subsequent trial. Further, it appears to us, that if any other view of section 20 (3) of the Constitution were to be adopted, evidence which under the Indian Evidence Act is admissible under the heading of " confessional statements ", including both of " non-judicial " nature, and also of a "judicial " nature recorded by a specially empowered Magistrate under section 164, Criminal Procedure Code, will have to be excluded.

We are therefore of the opinion that the bar under Article 20 (3) of the Constitution will not be available to the statements in this case, since it is not in dispute that they have been recorded only during an investigation undertaken by the Customs Officer under sections 107 and 108 of the Customs Act of 1962, and at a time when the deponents did not stand in the position of accused in the light of the principles stated in the decisions cited above.

Opinion delivered accordingly.

The petition coming on for hearing, on expression of opinion of the Full Bench, the Court made the following

ORDER.—In accordance with the decision of the Full Bench, the order of the learned Sessions Judge pronounced on 30th October, 1965 on the preliminary objection is set aside, and the learned Sessions Judge is directed to dispose of the case in accordance with law and in the light of the decision of the Full Bench.

The stay of the trial of the Sessions Case will be vacated.

R.M. *Order accordingly.*

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1. (1963) 1 S.C.J. 195 : (1963) M.L.J. (Crl.) 97 : A.I.R. 1961 S.C. 1808.
2. (1954) 1 M.L.J. 680: (1954) S.C.J. 428: (1954) S.C.R. 1077: A.I.R. 1954 S.C. 300.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M NATESAN.

C. S. Peeran Sahib and others .. *Appellants**

v

The Madras State Wakf Board, Madras, represented by its Secretary .. *Respondents.*

Muslim Wakfs Act (XXIX of 1954) as amended by Act (XXXIV of 1964), sections 3 (1) and 66-C—Creation of valid wakf—Requirement that dedication must be by person professiong Islam—Applicable to first as well as second part of definition of wakf contained in section 3 (1)—Scope of section 66-C

Wakf—Takia and Public graveyard—Nature of—Creation of wakf—Requirements.

To be a valid wakf under section 3 (1) of the Muslim Wakfs Act, 1954, as amended in 1964, the dedication must be by a person professing Islam. The contention that the requirement as to the grantor professing Islam is confined only to the first part of the definition and that the latter part by which are included a wakf by user and grants for any purpose recognised by the Muslim law as pious, religious or charitable are not controlled by that requirement, is untenable The use of the expression 'includes' in section 3 (1) is not to enlarge the meaning of the word wakf set out in the body of the statute but only to illustrate the wakfs that even the restricted definition would take in. It is not employed for the purpose of adding to the meaning of the expression 'wakf' in the body of the definition, grants by non-Muslims also The practical effect of such a reading will be to take away the restriction even from the body of the definition, as dedication coming under the body of the section could also be brought in under sub-clause (ii) of section 3 (1) as grants.

If the contention that in regard to wakfs brought in by the inclusive definition in section 3 (1) the limitation that the grantor must profess Islam is not applicable is accepted, section 66-C introduced by the Wakf (Amendment) Act of 1964 will become otiose. It cannot readily be assumed that this amendment is a surplusage It will be seen that for the applicability of section 66-C there must be an existing wakf If to an existing wakf for any of the objects specified in section 66-C a person not professing Islam gifts property, then such property shall be deemed to be comprised in that wakf and dealt with in the same manner as the wakf in which it is so comprised. Thus, the limitation that the creator of a wakf must be a person professing Islamic faith is removed only to a restricted extent under section 66-C of the Act.

Takia liberally means a resting place and a burial ground is sometimes called *takia*. The fact that a place is called a *takia*, does not prove that it is wakf property. A man may take charage of a graveyard and call himself a *takiadar*, but that does not show that the land is wakf or that he is the mutavalli but a *takia* may become a wakf by long use. There can be no doubt that a public graveyard would be wakf property and private ownership or endowment of the same is incompatible with its very character. Reference to a site as *kabarastan* will be *prima facie* evidence that it is a public graveyard in the sense understood in Muhammadan law

There is no essential formality or the need for use of any specified phrase or term prescribed for the constitution of a wakf Where an effective dedication is intended, the law will give effect to it in whatever language it may be expressed or in whatever term the wish may be expressed or formulated. A wakf may be made orally or by writing A wakf normally requires express dedication but if land has been used from time immemorial for a religious purpose then the land is by user wakf, although there is no evidence of express dedication. User is evidence of dedication.

It is well settled that it is not even necessary to name the objects and specify the sum to be spent on any particular object.

Where a land has been set apart as a graveyard from time immemorial a dedication of the land as wakf absolute may be presumed and it is not necessary in such a case to prove actual dedication as wakf Once a property has become wakf, any amount of assertion of hostile title to the property by the Mutavalli or other persons entering into the management of the wakf property will not take away its wakf character.

Appeal against the Decree of the District Court, West Tanjore at Tanjore, in O.S. No. 13 of 1960.

S. Kothandarama Nainar, for Appellants.

M M. Ismail and *M. A. Sathar Sayeed*, for Respondent.

The Judgment of the Court was delivered by

Natesan, J.—This is an appeal by the plaintiffs whose suit questioning the validity of the inclusion of their institution " Mia Sakah Sahib Durga " in the town of Tanjore as a wakf under the Wakf Act (XXIX of 1954) has been dismissed by the learned

* Appeal No. 125 of 1962. 29th July, 1966.

District Judge, West Tanjore. Section 4 of the Wakf Act provides for a preliminary survey of wakfs in the State, and, under section 5, provision is made for the publication in the Gazette a list of wakfs in the State containing prescribed particulars. In the Fort St. George Gazette dated 24th December, 1958, in the notification under the powers conferred by section 5 of the Wakf Act, " Mia Sakab Sahib Darga ", Gandhi Road, Tanjore Town, is shown as a wakf. The nature and object of the wakf are stated to be pious, religious, and charitable and for the maintenance of Durga and Aar sheriff and for conduct of Urus and fathia, to distribute money to the poor, etc. The contention of the plaintiffs is that the institution in question is not a wakf as defined in Act XXIX of 1954, and therefore shold not have been notified under the said Act It is their case that properly speaking there is only a thaikal or burial place and that to the Thaikal was granted in inam the properties stated to be wakf, by the Hindu Maharatta King Ekoji Raja of Tanjore about the 18th century. The plaintiffs claim to be the descendants of the original grantee from the Maharatta King. According to the plaintiffs, in a portion of the properties of the Thaikal, there are tombs of the ancestors of the plaintiffs, and the grant is personal to their ancestor for the maintenance and upkeep of the family Kabarasthan (grave). The income from the properties were utilised by the plaintiff and their ancestors for their own purposes and there was never any dedication of the properties as a wakf. Portions of the properties had been alienated by way of sales and mortgages and repurchased or redeemed The properties have been the subject of partitions in the family. At considerable cost buildings have been put up and houses constructed. The principal contention of the plaintiffs is that the original grant was by a person not professing Islam and therefore there is no wakf as defined under the Wakf Act The plaintiffs therefore prayed for a declaration that " Mia Sakab Sahib Durga " is not a wakf under Central Act XXIX of 1954, and for deletion of the Durga from the list of wakfs notified The respondent, the State Wakf Board, in its written statement relied on such evidence of the original grant as was available and pleaded that the institution was at any rate a wakf by user For the respondent it was further stated that a dedication of the properties as wakf could be found in the family partition evidenced by Exhibit B-3 daed 17th January, 1942. The learned District Judge was not inclined to accept the case of wakf by user, and was of the view that even if the original grant could not be held to constitute a valid wakf, from the terms of the partition deed, Exhibit B-3 a dedication to wakf could properly be inferred.

The only evidence of the original grant is the extract from the Fair Inam Register, Exhibit A-5. Pending the inam enquiry in Fasli 1270, the property was placed under attachment, but, later it was struck off and no inam title deed was issued, as the Government ordered that the provisions of the Inams Act could not apply to the properties situate in Mokhasa village granted to the heirs of the last Maharaja of Tanjore in 1862 by way of retsoration of their personal properties Even though no title deed has been issued, the Inam enquiry in this State is regarded as a land-mark and the record of the proceedings of the enquiry considred valuable evidence In the Inam Register Extract, the class to which the grant belongs is noted as " devadayam ". The word " devadayam ' it has been held, indicates a gift for religious purposes, but does not necessarily connote anything more. In column 8 it is stated that the grant is for the support of a Thaikal or mosque at Pudupatnam kept up at the time of the enquiry. Pudupatnam is now part of Tanjore, but it is nobody's case that the grant was for a mosque. In fact, it is noted in the remarks column that the inam is filled with Kabarasthan (graves) and that it appeared from enquiry that the inam was granted by Ekoji Raja to Miran Syed Mohammed Tazeem Tarak Khadir for the support of the Kabarastan which was efficiently maintained There is no entry in the column " by whom granted and in what year " The name of the original grantee, it is stated, was shown as " Miya Sakab Sahib Takkai " in fasli 1216 and that was the name entered in the register prepared according to Regulation No XXXI of 1802. The total extent is shown as 18 acres 8 cents and it is noted hat the excess 2.73 is filled with Kabarasthan. The Inam Register Extract records

under column "Decision of the Inam Commissioner or his Assistant" that it is struck off. Exhibit A-4, the extract from the Paimash survey register for fasli 1216, shows that there were 100 samadies The present survey numbers of the properties of the Thaikal are T.S. 65 and 74 and the Kabarastan in is T.S. 65. Thaikal is the corruption of the Persian word "Takia" "Takia", it is seen from the Principles of Muhamadan Law by D. F. Mulla, 15th Edition, means literally a resting place, and that a burial ground is sometimes called a takia It is also noted at page 200 that the fact that a place is called a takia, does not prove that it is wakf property. The learned author notices that a man may take charge of graveyard and call himself a takiadar, but that does not show that the land is wakf or that he is the mutavalli; but according to the learned author, a takia may become wakf by long use. There can be no doubt that a public graveyard would be wakf property and private ownership or endowment of the same is incompatible with its very character. Reference to a site as Kabarastan will be *prima facie* evidence that it is a public graveyard in the sense understood in Mohamedan law. But the property involved in the case is an extent of over 18 acres, of which over an extent of about 2 73 acres only there were graves. We find from the Paimash Register for fasli 1216 that there were 100 samadies. Apart from the matters found recorded at the time of the inam enquiry, we have no other evidence of the original grant It is not clear whether even by the time of the grant, the kabarastan was there as a public graveyard and had become a wakf or whether the grant itself was for a kabarastan and its support. At the inam enquiry, the area of the kabarastan was also shown as included in the extent of land granted

Central Act XXIX of 1954 as amended by Central Act XXXIV of 1964 by section 3 (1) defines "wakf" thus.

"'Wakf' means the permanent dedication by a person professing Islam of any moveable or immoveable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes (i) a wakf by user, (ii) grants (including *mashrut-ul-khidmat*) for any purpose recognised by the Muslim law as pious, religious or charitable, and (iii) a *wakf-alal-aulad* to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable; and 'wakif' means any person making such dedication."

To be a valid wakf under this definition, the dedication must be by a person professing Islam. The only evidence we have as regards the grant in this case is that it was made by the Maharatta King Ekoji Raja for the support of a Kabarastan. In the report of the enquiry submitted with reference to the present institution under section 4 of the Wakf Act, Exhibit B-1, it is specifically noted in more than one place that the endowment is by a non-Muslim It is unnecessary to consider the question whether the grant by a Hindu King for a Muslim graveyard would constitute a wakf under the common law. In Ameer Ali's Mohamadan law, Volume I, at page 200, it is stated:

"Islam is not a necessary condition for the constitution of a wakf Any person of whatever creed may create a wakf, but the law requires that the object for which the dedication is made should be lawful according to the creed of the dedicator as well as the Islamic doctrines"

It will be a moot question for consideration and this we find raised by the appellants whether there could be a valid gift or grant for worship at a graveyard by a Hindu, though Hindu king may properly set apart lands for use as graveyards by any class of his subjects. It is, however, not necessary to consider this aspect of the matter, as what we have to see here is whether the grant in question satisfies the requirements for a wakf under the Act As stated, the dedication is not by a person professing Islam Strictly, the grant will not come under the definition of 'wakf'. However, learned Counsel for the State Wakf Board contends that under the latter part of the interpretation clause, as a wakf by user or as a grant for any purpose recognised by the Muslim law as pious, religious or charitable, it would be a wakf and that there is no limitation in sub-clause (ii) of the definition that the grant must be by a person professing Islam. Learned Counsel contends that the requirement as to the grantor professing Islam is confined only to the first part of the definition and the latter part by which are included a wakf by user and grants for any purpose recognised by the Muslim aw as pious, religious or charitabe, are not controlled by the requirement that the creator must profess Islam. The contention is rested on the

well-known rule of statutory drafting that the inclusive definition is generally used to enlarge the content of the expressions in the body of the section and to take in what would otherwise be excluded. Our attention is drawn to the observation of Lord Wastson in *Dilworth* v *Commissioner of Stamps*[1].

"The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, and when it is so used those words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declared, that they shall include."

To our view, the use of the expression 'includes' in the interpretation clause in the present context, is not to enlarge the meaning of the word 'wakf' set out in the body of the statute, but only to illustrate the wakfs that even the restricted definition could take in. Sub-clause (ii) of section 3 (1), on which reliance is placed, was introduced by the Wakf (Amendment) Act of 1964. Prior to the amendment, by the sub-clause (ii) was included any "mashrut-ul-khidmat". There has been no amendm nt to the body of the section. Another important change is the introduction of section 66-C, which we shall be considering presently. Now the body of the section imposes a restriction as to the faith of the grantor and this has been retained even after the amendment He must be a person professing Islam. There have been divergent views as to whether a non-Muslim can be the founder of a wakf. The requirement that the person making the dedication must be one professing the Muslim faith it is found in the Wakf Validating Act of 1913 also. It is in this background, that the definition specifically imposes a restriction on the faith of the person creating a wakf and section 66-C relaxes the rule in certain circumstances. It is difficult to read in the context that that restriction is removed with reference to those wakf which are brought in by the inclusive clause, as the practical effect of such a reading will be to take away the restriction even from the body of the definition as dedications coming under the body of the section could also be brought in under sub-clause (ii) of the inclusive part as grants. It is not as if this restriction that the creator of the wakf must be a person professing Islam, cannot be insisted upon with reference to those wakfs which are brought in by the inclusive definition. If by the amendment to the inclusive part of the definition, it is intended to remove the restriction and expand the scope, why then should the interpretation clause start with an express limitation imposing the requirement that the dedication must be by a person professing islam?" There is no need to impose this restriction in the first part of the interpretation clause and then expand the content of the inclusive definition, if there could be valid wakf, however and by whomsoever founded. The first part of the interpretation clause speak of a dedication. There is no essential formality or the need for use of any specified phrase or term prescribed for the constitution of a wakf. Where an effctive dedication is intended, the law will give effect to it in whatever language it may be expressed or in whatever terms the wish may be expressed or in whatever terms the wish may be formulated. A wakf may be made orally or by writing. A wakf normally requires express dedication but if land has been used from time immemorial for a religious purpose *e g.*, for a mosque or a burial ground or for the maintenance of a mosque, then the land is by user wakf, although there is no evidence of express dedication ; see Mullah's Mohomedan Law, 15th Edition, page 166 User is evidence of dedication. A property may become wakf by immemorial user, although there is no evidence of an express dedication. The inclusive definition makes it clear that a wakf by user and a wakf-alal-aulad, that is, a wakf for the benefit of the settlor's family and his descendants will also be a wakf under the Act to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable. We are of the opinion that the word " includes ' in the present case in section 3 (1) is not employed for the purpose of adding to the meaning of the expression 'wakf' in the body of the definition, grants by non-Muslims also. A reading of the relevant sections of the Act, sub-caluses (*a*) and (1) of section 3 and section 66-C shows that by the expression "and includes" in section 3 (1), the content of the body of sub-clause (1) was not intended to be enlarged in the sense contended for.

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1. L.R. (1899) A.C. 99.

If we are to accept learned Counsel's contention that in regard to wakfs brought in by sub-clause (ii), the limitation that the grantor must profess Islam is not applicable, section 66-C of the Act introduced by the Wakf (Amendment) Act of 1964, will become otiose. Section 66-C reads thus :—

> "Notwithstanding anything contained in this Act where any moveable or immoveable property has been given or donated by any person not professing Islam for the support of a wakf being (*a*) a mosque idgah, imambara, dargah, khangah or a maquars, (*b*) a Muslim graveyard, (*c*) a choultry or a musafarkhana, then such property shall be deemed to be comprised in that wakf and be dealt with in the same manner as the wakf in which it is so comprised"

We cannot readily assume that this amendment is a surplusage when it has been solemnly introduced by the same amending Act which amended the interpretation of section 3. It will be seen that for the applicability of section 66-C there must be an existing wakf. If to an existing wakf, for any of the objects specified in section 66-C a person not professing Islam gifts property, then such property shall be deemed to be comprised in that wakf and dealt with in the same manner as the wakf in which it is so comprised In our view, the limitation that the creator of the wakf must be a person professing Islamic faith is removed only to a restricted extent under section 66-C of the Act. A grant in support of an existing wakf as defined under the Act, by whomsoever made, in made a wakf under the Act When we read the definition section 3 (1) and section 66-C together, it is clear that for founding a wakf under the provisions of the Act in the first instance, that is for the original foundation, the grantor must be a person professing Islam. The statute, certainly, for understandable reasons it may not appeal to every one has excluded original foundations by non-Muslim from the operation of the Act.

In this case, we have no evidence of the original grant except what has been recorded at the enquiry by the Inam Commissioner. The recording by the Inam Commissioner by itself certainly does not amount to any dedication. As pointed out at the outset, the entry in column 8 refers to the grant being for the support of Thaikal or mosque. There was no mosque in the locality. The remarks column refers to the grant being for the support of a kabarasthan But, as discussed already, it does not appear that a wakf had come into being before the grant was made by the Hindu King. The grant includes the area of Kabarastan. In *Vidya Varuthi* v. *Baluswami Aiyar*[1], it was observed :

> "Considerable stress was laid on behalf of the respondents on the entry in the Inam Register that the dedication was for a specific purpose, viz , the worship of the idol The inam proceedings did not create any dedication They were instituted simply with the object of investigating titles to hold lands revenue free as belonging to valid endowments The gifts were made, long before the Inam proceedings, by the Hindu Kings or chiefs who then held the country The purposes of the dedication must therefore be gathered from established usage and practice"

Evidence of practice and usage of the institution there is little. For immemorial use of the property as a wakf, the property can certainly become a wakf under the Act. But we have only evidence of dealings with the property by the descendants of the original grantee as if it was their private property. Exhibit A-6 is a deed of Hibanama (gift) dated 19th May, 1876. Exhibit A-7 evidences an othi dated 9th July, 1894 There is no doubt reference in this to a Thaikal. Exhibit A-9 is the judgment of the District Court, West Tanjore, dated 18th November, 1896 and refers to the ownership of Thaikal lands in the family of the descendants of the original grantee It is found that on a portion of the Thaikal land there are tombs. The only oral evidence is that of the first plaintiff aged about 60, as P.W 1. He refers to the properties being leased, mortgaged and sold as private properties and succession to the properties under the Muhammadan law The income from the properties has now considerably gone up and he deposed that moneys are being spent for the private purposes of the members of the family. He admits to celebrating the death anniversary ceremony of saints entombed in the area and celebrating the Prophet's day and the annual Khanduri festival. The poor, it is stated, are fed

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1. (1921) L.R. 48 I.A. 302 (1921) 41 M.L.J. 346 : I.L.R. (1921) 44 Mad. 831 at 845 : 15 L.W. 78 (P.C.)

during the Khanduri festival and propaganda for Islam is done by P.W. 1 ; but that is only for the past ten years. He deposed that no Muslim can interfere or had interfered with their management. P W. 1 admits that S. No. 65, is Kabarastan. In these circumstances, when the learned District Judge concluded that any user can only date from the date of the partition Exhibit B-3 in the family in 1942, we cannot say that he has gone far wrong. The evidence of user and practice are only the recitals in the document and the evidence of P W. 1 for what they are worth, and the user of this evidence not sufficiently long to infer therefrom the scope and object of the dedication. No doubt, in the partition deed, Exhibit B-3, which has been alternatively relied upon by the respondent as establishing a dedication, in more than one place, there is reference to the incurring of expenses for the durga as per custom and usage. As to what that custom and usage are, there are no details.

However, whether a valid wakf was created at the origin by the Maharatta King or not, it is certainly open to the decendants of the grantee, who are Muslims to themselv ss declare the wakf character of the properties and create a wakf, and here there can be no question that a wakf satisfying the requirements of the Wakf Act has come into existence during the partition in the family of the plaintiffs evidenced by the partition deed, (registration copy). Exhibit B-3 dated 17th January, 1942. There is a clear declaration of a wakf of specified properties. The instrument commences with the recital that the partition deed was is respect of the conduct of a trust. The preamble states that the division is of the family properties as also " the net income left behind after meeting the expenses relating to the Durga as per custom and *Anushtanam* that are entitled to be partitioned from the income of the trust properties " mentioned. It is well settled that it is not even necessary to name the objects and specify the sum to be spent on any particuar object. In the preamble it is stated that the other parties to the deed agree to the present first plaintiff managing the properties of the family situate in Tanjore Cusba, Durga known as Hazarath Syed Mian Sakab Sahib Kadri and the properties attached thereto There is reference also to a durga at Chidambaram, but with that we are not concerned here. It is stated that the parties thought it proper to make arrangements for the durga Among the properties, it is said, are included vacant site of Hazarath M yan Sakab Khader, Tanjore and Kabarasthan vacant places attached to it, and buildings, etc. The schedules specify certain properties as trust properties and the 'A' schedule one of the schedules allotted to the first plaintiff is headed as describing the properties belonging to Tanjore Hazarath Mian Sahib Thaikal. It contains portions in T.S. No. 74 and also T. S. No. 65 Hazarath Mian Sahib Kabarastan, garden, vacant site, etc. In T.S. No. 74 punja referred to as punja belonging to a Mian Sahib Thaikal, all the four sharers are given shares, as shares in trust properties and residential buildings are found included therein. The present first plaintiff is stated to have been acting as trustee and Mutavalli till then and managing the charities properly. It is provided that in future also he shall be the trustee and mutavalli, collect the income derived from the properties pertaining to the respective durga in the capacity of trustee and Mutavalli, utilise the amounts so collected for the improvement of the respective durga and for meeting the expenses in connection with Urs, Ashrasheriff, Fathia, etc., taking into consideration the customary practice and take the excess amount himself. The mutavalliship is to continue in the family of the first plaintiff hereditarily. While the document sets out in the schedule the properties to be held in trust, neither the scales of expenditure to be incurred for the charities and ceremonies with reference to the practice and usage referred to in the document nor the practice and usage are specified. The excess over the expenditure according to the custom and *Anushtanams* has to be taken by the Mutavalli. The properties are all made inalienable The heirs of the sharers should similarly incur the expenses for the charities and take the excess. It may be that the wakf created in this case is a valid wakf-alal-aulad there being benefit for the family of the executants but not exclusively for their benefit. Such a wakf also is brought under the definition in sub-clause (iii) of section 3 (1) of the Act In the case of a wakf-alal-aulad, it is a wakf under the Act only to the extent to which the property is dedicated for any purpose recognised by the Mohamedan Law as pious, religious or charitable

That there is such a dedication, there can be no doubt. Such dedication can be inferred from the evidence of P.W. 1 himself, apart from the express recitals and the general tenor of the partition deed. So far as the area occupied by the graves is concerned, there can be no question about its wakf character. Where a land has been set apart as a graveyard from time immemorial, a dedication of the land as wakf absolute may be presumed and it is not necessary in such a case to prove actual dedication as wakf. Once a property has become wakf, any amount of assertion of hostile title to the property by the Mutavalli or other persons entering into the management of the wakf property for the wakf will not take away its wakf character. As regards the rest of the properties, even if no 'wakf' in terms of the Wakf Act was created originally, by virtue of Exhibit P-3 we can hold that such a wakf as declared in Exhibit B-3 has come into existence.

The prayer in the suit is for a declaration that the " Mia Sakab Sahib Durga", Tanjore town is not a wakf under Central Act XXIX of 1954 and that the inclusion thereof under section 5 (2) of the Act in the list of wakfs existing in the estate is invalid and for deletion of the institution from the list of Wakfs notified. This relief, on the findings above given, the plaintiffs are not entitled to. A wakf-alal-aulad would be a wakf to the extent to which the property is dedicated for recognised purposes, and the Wakf Board certainly would have only limited jurisdiction in the matter. The Board will be bound by the provisions of the partition deed as to the disposition of the income from the properties—see *Ibrahim Sahib Trust* v. *State Wakf Board*[1]. If the Mutavalli for the time fails to distribute the income and spend the moneys for the religious and charitable purposes as per the usage and custom referred to in the deed, it may become necessary, at the instance of the Wakf Board or other interested parties, to have a scheme framed regulating the expenses and providing for the carrying out of the objects of the Wakf. The present is not a suit for quantifying the extent of the wakf in relation to the pious, religious and charitable purposes. The scope of the present suit is limited and on the findings the plaintiffs cannot have the relief prayed for deleting the " Mia Sakab Sahib Durga ", Tanjore Town, from the list of wakfs notified under section 5 (2) of the Central Act XXIX of 1954.

In the result, the appeal fails and is dismissed with costs

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

Lt. Col. J. K. Dhairyam, by Power of Attorney Agent, R.S. Amrithraj and two others .. *Plaintiffs**

v.

Dr. George Desraj Dhairyam. .. *Defendant.*

Original Side Rules (Madras High Court), Order 13—Procedure under an Originating Summons to determine questions under—When can properly be invoked.

Order 13 of the Original Side Rules of the Madras High Court enables the trustees, under any deed or instrument, interested in the relief sought as heir or legal representative or a *cestui qui trust* to take out an Originating Summons for determination of any of the questions set out in the said order and they include questions affecting the rights claimed as such heir, legal representative or *cestui qui trust.*

The Original Side Rules of the Madras High Court are largely modelled on English Practice and Procedure. (For the English Practice with regard to Originating Summons see judgment).

The procedure is primarily designed to deal with questions of law or discretion arising upon facts substantially not in dispute and indeed where there is any choice in the matter, it is wrong to bring proceedings by Originating Summons if it is known that the facts are disputed.

No doubt a Court will in the exercise of its discretion decide a question raised on Originating Summons if it is satisfied that the defence raised is frivolous and designedly intended to drive the parties to a suit. The Court will not decide a question on an Originating Summons if the decision of the question, whichever way it goes, will not settle the litigation between the parties.

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1. I L R. (1964) 2 Mad. 618 · (1965) 1 M L.J. 214 77 L W. 381.

*C.S. No. 229 of 1965. 29th November, 1966.

Questions on an Originating Summons should not, as a rule, involve difficult and complicated points of law.

Where, as in the present case, questions both of fact and of construction were involved and a decision of the question of construction would not necessarily put an end to the litigation, an Originating Summons is not the proper mode of procedure.

In the instant case the questions raised relating to the administration of a trust cannot be decided on Originating Summons when substantially the same questions are pending for decision before a competent civil Court in a suit between the parties.

Originating summons under the Original Side Rules of the High Court for decision in question of administration of a trust.

T. R mprasad Rao and *A. Venkatesan*, for Plaintiffs.

R. Mathrubutham and *T. S. Sundara Iyer*, for Defendant.

The Court delivered the following

JUDGMENT.—Plaintiffs 1 and 2 are the son and daughter and the third plaintiff is the widow of late Dr. J. Dhairyam, a retired Superintendent of the Government Mental Hospital. The defendant Dr. G D Dhairyam is another son of late Dr. Dhairyam Deceased Dhairyam, according to the plaintiffs, had opened a Mental Clinic and Nursing Home after his retirement at No. 16/3, Sterling Road, Nungambakkam, which, the plaintiffs claim, attained in due course great popularity and attracted patients even from foreign countries. The third plaintiff assisted her husband in running the Nursing Home and Clinic and attended to the needs of the patients. The late Dr. Dhairyam got the defendant trained in Psychiatry and two other children, Antony Shamraj and Shanti Mrinalini, qualified in medicine with the desire that they should assist him in running the clinic. But the late Dr. Dhairyam died on 30th September, 1956, leaving behind, his widow the third plaintiff, four sons and two daughters of whom one of the sons, Christy Amrithraj died in 1963 and another, Antony Shamraj is in England. The plaintiffs say that subsequent to the death of their father Christy Amrithraj and Joseph Kantharaj (first plaintiff) and one of the daugthers Maggi Amritraj relinquished and renounced their rights in the properties of their father, and agreed to create a trust in respect of his estate including the Clinic and Nursing Home and agreeably a trust deed was executed on 19th October, 1957, with plaintiffs, the defendant and deceased Amrithraj Dhairyam as trustees. Under this deed, all the properties of late Dr. Dhairayam were transferred to the trustees to be held in trust for the beneficiaries, the plaintiffs, Christy Amrithraj Dhairyam and defendant, subject to the limitations specified therein. Pursuant to this arrangement the trustees entered into possession and management of the estate, the Clinic and Nursing Home and the defendant was paid an allowance of Rs. 500 a month which was subsequently raised to Rs. 650. Shamraj Dhairyam did not return to India. The defendant was placed in charge of day-to-day work in the Clinic and Nursing Home and the amounts received were being paid over to the trustees. After the death of Christy Amrithraj in 1963, plaintiffs 1 and 2 became the sole trusees; but the defendant assumed a hostile attitude and wanted to be in sole control and management of the Clinic and Nursing Home. He refused to pay the collections to the trustees or the third plaintiff, set up adverse claims to the Clinic and declined to account to the trustees.

In 1965, the defendant filed a suit in the City Civil Court for a declaration that the business of Dhairyam Mental Clinic and Nursing Home and its adjunct, Rehabilitation Centre is exclusively his own and for restraining the plaintiffs from interfering in regard to them and filed I.A. No. 663 of 1965, for an interim injunction restraining the plaintiffs form interfering with the running of the Mental Clinic and Nursing Home. The defendant has alleged in the suit that he is solely entitled to the Clinic and Nursing Home and is not liable to render any account to any of the plaintiffs. This position is opposed to trust and disregarded the solemn obligation undertaken by him under the trust deed The City Civil Court passed an interim order in the exercise of its inherent jurisdiction and while restraining the third plaintiff from discharging the customary and usual duties and plaintiffs 1 and 2 from performing their functions as trustees expressed that it was so directing, "in order to keep the object of the trust and to continue it."

The plaintiffs aver that since the powers of the City Civil Court are limited they have to approach this Hon'ble Court for the usual remedies available to them and that has necessitated institution of this suit under the Original Side Rules for a decision of the questions relating to the administration of the Trust. The questions in respect of which determination is thus sought relate to the rights of plaintiffs 1 and 2 (1) to carry on and manage the Clinic and Nursing Home and employ the necessary staff on such remuneration as they may decide, (2) to control, advice and guide the defendant in regard to the day-to-day administration of the Clinic and Nursing Home, (3) to collect moneys payable to the Clinic and Nursing Home and their right to make payments towards obligations, (4) the right of the third plaintiff to a share in the net profits of the Clinic and her right to receive 4/7 parts of the net income, (5) the right of the defendant to an allowance and one part of the net income, (6) the right of the plaintiffs to restrain the defendant to prevent them from exercising control over the running of the Clinic and Nursing Home, and (7) such other questions incidental to the above questions.

The defendant does not admit that his father Dhairyam started any Clinic and Nursing Home. According to him, the small Clinic started by the father became defunct and the present Clinic and Nursing Home was started by him He filed the suit (O.S No. 229 of 1965) in the City Civil Court as the plaintiffs attempted to interfere with his professional work and in C M A No 24 of 1965 filed by the plaintiffs against the order of interim injunction, the appellate Court, while dismissing the appeal, has directed the parties to act according to the terms of the compromise. The defendant contends that the issues raised in this originating summons are directly and substantially in issue in the aforesaid suit. The family property consisted of only the building and compound and not even for estate duty purposes was either the Nursing Home or the Clinic or the equipment valued as part of father Dhairyam's estate. The late Dhairyam never expressed any desire to constitute any family concern. Christy Amrithraj, Joseph Kantharaj and Maggie Amritharaj never renounced any right in any property, but got all that they needed from the mother who was in charge of the household in the same compound And, the plaintiffs have now joined after this defendant refused to part with his income with the vindictive object of ruining his professional career.

The document dated 19th October, 1957, is not a trust deed in any sense of the term. As the authors of the trust are the beneficiaries, the trustees, are co-tenants and the purpose of the trust is not in consonance with the object of any real trust. The document never came into operation and the parties never acted upon the terms There was no vesting of any property much less the Clinic and Nursing Home in the alleged trustees. The second plaintiff has started a Packing Cases Industry in the very compound with a view to cause impediments to the defendant carrying on his profession peacefully The so called trustees never entered into possession and management of the Clinic and the defendant has never acted under their control, guidance and advice. Out of deference to the third plaintiff, the mother, the defendant had given his earning to her to meet the household expenses and conserve the balance for his benefit, but her leanings were towards her daughter, and, therefore, the defendant had to refuse to part with his earnings.

In the very nature of things, the reliefs sought in the suit cannot be the subject-matter of Originating Summons The defendant as admitted by the plaintiff has never been acting under the trust but has been claiming the Clinic and Nursing Home as his at least from 1963 without recognising the trust If really the plaintiffs have a case that there is a valid and enforceable trust and they have rights thereunder. the matter has to be determined in appropriate proceedings and not in an originating summons The cause of action and the valuation also according to him are neither valid nor correct and none of the reliefs is a matter to be decided in an Originating Summons.

The point for determination is whether the questions raised can be determined in this suit by Originating Summons when substantially the same questions are in issue between the parties in O.S. No. 229 of 1965 on the file of the City Civil Court

wherein the present plaintiffs as defendants there have entered appearance and filed written statements giving rise to as many as 11 issues of which issue 7 reads : " Is the Clinic and Nursing Home part and parcel of the trust or a separate entity ? "

The declaration prayed for in O.S No. 229 of 1965, is that the profession and business of " Dhairyam's Mental Clinic and Nursing Home" carried on by the defendant and the Rehabilitation Centre as an adjunct to the said profession is exclusively his and the defendants have no rights whatsoever over them. There is also a prayer for a permanent injunction restraining the present plaintiffs from interfering with or obstructing the defendant in any manner whatsoever from carrying on his said profession In answer, the plaintiffs filed written statements there contesting the exclusive claims made by the defendant and their contest was substantially rested on the trust deed dated 19th October, 1957, to which the defendant was also a party. Other issues have also been raised in O S. No 229 of 1965, relating to the effect and the binding character of the trust deed on the defendant herein whether he has committed any violation of the terms thereof, whether he was carrying on his profession in his own right or in derogation of the rights under the trust or whether he was an employee of the trust.

The trust deed was executed by the third plaintiff, the defendant, Antony Shamaraj and Shanti Mrinalini as beneficiaries and Christy Amirtharaj, Joseph Kantharaj (first plaintiff) and Maggie Nambikkai Amirtharaj (second plaintiff) as trustees. The preamble to this document refers to the trustees having renounced their interests, the father Dhairyam having purchased No 16/3, Sterling Road, built therein four main buildings and out houses and started the Mental Nursing Home and Clinic with a desire that it should be continued by his wife and children, and trustees having agreed to the arrangement The operative portion of this document purports to transfer all the properties described in the schedule, by the beneficiaries to the trustees to hold in trust for the beneficiaries subject to the powers and limitations referred to in the document The trustees are to manage the Mental Nursing Home and Clinic, employ the necessary staff, make the requisite purchases and carry on all dealings necessary and incidental to the efficient management of the institution, with C. D. Dhairyam the defendant herein, in charge of the day-to-day administration with the designation of "Director" but he and the other beneficiaries are to be under the control, advice and guidance of the trustees The third plaintiff is to be in immediate charge, control and management of the finance of the estate and is to inform the other trustees of the receipts and expenditure. The defendant is to be paid an allowance of Rs. 500 a month but the right is vested in the trustees to reduce such allowance in case of deterioration of the financial position The Clinic is to be run for the profit and benefit of the beneficiaries and from out of the profit, the trustees can set apart such part as they deem fit proper for helping the needy relatives of father Dhairyam and for charity. The surplus net income after meeting the expenses contemplated in paragraph 8 of the document is to be distributed among the beneficiaries as specified therein. Provision is made for the marriage expenses of Mrinalini, and also for disposal when necessary of any portion of the estate for benefit of the beneficiaries. The trustees are to meet and discuss the affairs of the Clinic and the estate once in a month when they are expected to scrutinize the accounts relating to Clinic and estate and decide questions relating to the running of the Nursing Home and Clinic. In the event of any vacancy arising in the office of trustees, the other trustees can co-opt any other person as a co-trustee and the trust is to remain irrevocabale for a period of forty years.

Though called a trust deed, the document is in effect a family settlement the only charity contemplated under the document being the help to be rendered to the poor relations of father Dhairyam and spending on charity of such portion of the income as the trustees deem proper. Even this, is discretionary which the trustees might or might not enforce, and all the reliefs now prayed for relate to the family members called benefiiaries

Order 13 of the Original Side Rules enable the trustees, under any deed or instrument interested in the relief sought as heir or legal representative or a *cestui qui trust* to take out an originating summons for determination of any of the questions

set out in the said order and they include questions affecting the rights claimed as such heir, legal representatives or *cestui qui trust* In this view of the matter it is perhaps competent for the plaintiffs to seek the directions prayed for by them. But the question still is whether having regard to the pendency of a suit in the City Civil Court raising substantially the same question, it is just, proper and necessary for this Court to determine the questions raised by the plaintiffs

Mr Mohan Kumaramangalam had also drawn my attention to the definition of 'trust' in the Trust Act in the course of his submission that the matter really is not one for an Originating Summons. Section 3 of the Act defines 'trust' as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the author of the trust; the person who accepts the confidence is called the trustee; the person for whose benefit the confidence is accepted is called beneficiary and the subject-matter of the Trust is called trust property Every person capable of holding property could be beneficiary and his beneficial interest includes his right against the trustee as the owner of the trust property The attempt of Mr. Kumaramangalam was to make out that the real object of a Trust has not been conformed to in the trust deed before us and, therefore, an Originating Summons is not an appropriate remedy.

Dealing with Originating Summonses, Odgers on Pleading and Practice states with reference to the English Practice (at page 344, 18th Edition) that it is one of the four originating procedures and under the English Practice, except in the case of proceedings which must be commenced by writ either as a result of the provisions of the rules or any Act, proceeding may be begun either by the writ or by Originating Summons as the plaintiff thinks fit When such summons first comes before the Master, he will give all necessary directions as to the further conduct of the proceedings as he thinks best adapted to secure the just, expeditious and economical disposal thereof. The Master may himself deal with the matter if he has, under the rules and the direction of the Judges from time to time, power so to do Some matters must be dealt with by the Judge in person, for example, the determination of questions of law in the construction of documents. But even where the Master has power, he may refuse to exercise it himself and send the matter to the Judge Any party has also the right to require him to send it to the Judge in person as in the case of interlocutory proceedings in an action and under the same conditions In a typical case, howver, the master will adjourn the summons to the Judge without expressing his opinion upon the matter, and may either adjourn it into open Court or into chambers. The procedure is primarily designed to deal with questions of law or discretion arising upon facts substantially not in dispute, and indeed where there is any choice in the matter, it is wrong to bring proceedings by Originating Summons if it is known that the facts are disputed Osborse in his Concise Law Dictionary (Fifth Edition, page 230) states that proceedings for commencement by Originating Summons are where the principal question is the construction of an Act, statutory instrument, deed, will, contract or other document or some other question of law and when there is unlikely to be any substantial dispute of fact But, sometime the procedure is obligatory even in cases where there may be very substantial disputes of facts examples of which are given in Odger's Pleading and Practice at pages 348 and 349

The Original Side Rules of our Court are largely modelled on English Practice and Procedure and Mr. Kumaramangalam emphasised that when, as in this case, the plea of the defendant is that the trust had never been acted upon and the defendant has made an assertion to that effect, matters cannot be decided in an Originating Summons. This, however, is a case where, quite apart from the propriety of deciding the questions raised by the Originating Summons, I am not prepared to agree with Mr Kumaramangalam's contention that the question mooted cannot, at all, be raised by Originating Summons It can certainly be directed for reliefs specified in Order 13, Original Side Rules (Order 45 of the Rules of 1927). But,

as pointed out by Ramaswamy, J, in *Nagarathnammal* v. *Veeraraghavan*[1], in dealing with a case under the old rules, even in cases falling under the clauses of that Order involving examination of witnesses, the Court in the exercise of its discretion may not dispose of complicated questions of law and fact for the procedure was conceived and intended to be of a summary nature No doubt a Court will in the exercise of its discretion decide a question raised on the Originating Summons if it is satisfied that the defence raised is frivolous and designedly intended to drive the parties to a suit The Court also will not decide a question on an Originating Summons if the decision of the question whichever way it goes will not settle litigation between the parties.

In *Nacharamma* v. *Nadamuni Chetty*[2], a Bench of this Court considered the scope of the rule in Order 45 of the old Rules The decision was that the procedure under Order 45, by way of Originating Summons was only intended to enable the Court to decide questions of construction of a will when the decision of those questions, whichever way it might go would settle the litigation between the parties. Where, however, there are questions of fact which could be decided only by evidence and the defendant is in possession of property and the construction of the will would not terminate the litigation between the parties and the rights of the parties would not be finally determined, the Court should refer the parties to a suit and refuse to construe the will. It does not follow that in every case in which a defendant raises some factual contentions in an Originating Summons it must, of necessity, be dismissed. Each case must be dealt with in regard to its own peculiar circumstances.

In *Gokul Chand Dey* v. *Gopinath Dey*[3], the Calcutta High Court held that where dispute between the parties could not be disposed of merely by a construction of the Deed of Trust and other questions like plea of estoppel, and plea of adverse possession were involved and the pleas, if sustained might render the question of construction unnecessary an originating summons was not a proper made of procedure. Questions on an Originating Summons should not as a rule, as laid down by the Full Bench in *Bai Sarobbai* v. *Hussain Somji*[4], involve difficult and complicated points of law, and the same view was taken by Greaves in *Mitchell* v *McNell & Co*[5], when he laid down that the procedure by Originating Summons is not applicable to a contentious matter of the nature of a claim by a creditor to recover from the estate of the deceased whose estate is under administration and the procedure should be by suit.

Mr. Ramaprasada Rao for the plaintiffs relied on certain income-tax returns furnished by the defendant as also the correspondence that passed between the parties to emphasise that this is not a case where the defendant had not acted upon the trust and to urge that his present denial of the trust is deliberate design. In this context, he also relied on the observations of the Bench in *Nacharamma* v. *Nadamuni Chetty*[2], that because the defendant raises some factual contention, the Originating Summons, must, of necessity, be dismissed. According to him, where a Court is asked to determine on a summons, the true construction of a written instrument, the fact that the parties may after the decision on the construction litigate further on a question of fact with which the summons is not concerned is not a sufficient reason for the Court to refuse to determine such question of construction. This principle laid down by the Chancery Division in *Earl of Harrowby and another* v. *Leicester Corporation*[6], was also brought to my notice. But the question to be determined in this case as I have already indicated is whether, when substantially the same questions are implied and are liable to be determined on evidence by a Court of competent jurisdiction, it is necessary or even desirable to determine the said questions in an Originating Summons As pointed out in *J Lewis* v. *Green*[7], where questions both of fact and of construction were involved and a decision of the question of construction would not, in whichever way they were

1 A I R 1954 Mad 1008
2 (1947) 2 M L J 333
3. A I R 1952 Cal 705
4. A I R. 1936 Bom 330.
5 A I R 1927 Cal 518
6 114 Law Times Reports 129.
7 L.R. (1905) 2 Ch D. 340.

decided, necessarily, put and end to the litigation an Originating Summons was not the proper mode of procedure With great respect, this is a case of similar nature since the same questions are pending between the parties for determination in the City Civil Court.

In the circumstances, I am not inclined to determine the questions raised by the plaintiffs before a final decision is come to in the suit in the City Civil Court between the parties. This suit is accordingly dismissed, but in the circumstances, I make no order as to costs.

V.K. ——— *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE K VEERASWAMI AND MR. JUSTICE N KRISHNASWAMY REDDY

S. Ramachandra Iyer,
(Receiver of AL VR ST. Estate, Devakottai) .. *Appellant**

v.

RM. M A. Annamalai Chettiar and others . *Respondents.*

Limitation Act (IX of 1908), sections 13, 19—Acknowledgment during the extended period of limitation under section 13—If can give a fresh start

Section 13 of the Limitation Act, 1908, relates to computation of time and allows exclusion of time in certain circumstances The fact is that to the extent exclusion is allowed, there is in effect a *pro tanto* extension of the period of limitation, unlike under section 4 On account of such exclusion, during the resulting period of limitation so to speak, there can well be an acknowledgment under section 19 This is clear from the opening words of section 19 (1), namely, ' before the expiration of the period prescribed for a suit or application ' If therefore an acknowledgment is within the period of limitation prescribed, but as computed after exclusion of time mentioned in section 13, it is difficult to see why it is not within the ambit of section 19

Maqbul Ahmad v *Onkar Pratap Narain Singh*, 68 M L J 665 (P.C) and *Jayarama Aiyar* v. *Rajagopalan*, A I R 1965 Mad 459, distinguished as being concerned with section 4 of Act IX o 1908.

Editorial Note —It is difficult to follow how the last payment made on 21st June, 1955, is material for saving limitation in the instant case A part payment having been made on 1st July, 1949, limitation for filing the suit would not have expired before 1st July, 1952, assuming that Article 73 of 1908 Act governed the case The defendant having been absent from India from 14th June, 1952, to 3rd September, 1960, a suit filed on 3rd September, 1960 (which in fact was done) would have been saved under section 13 In this view, a decision on the question whether an acknowledgment during the extended period of limitation under section 13 could give a fresh start would have been unnecessary.

Appeal against the Decree of the Court of the Subordinate Judge, Devakottai, in Original Suit No. 53 of 1960.

R. Sethurama Sastri, for Appellant.

V. V. Raghavan and *M Naganathan*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—The appellant brought the suit, out of which this appeal arises, for recovery of Rs. 13,118-75 due on a promissory note, inclusive of interest, to AL. VR. ST. Estate, Devakottai. The appellant was appointed Receiver by this Court on 30th September, 1959, pending disposal of A.S. No. 223 of 1959. The promissory note was admittedly executed by the first respondent on 5th July, 1946, for a sum of Rs. 10,000 borrowed from the estate at its Madurai branch. On 1st July, 1949, there was a payment of Rs 250 On 14th June, 1952, there was a further payment of Rs. 2,000 by bank draft sent by the first respondent from Ipoh, with a covering letter. The suit was instituted on 3rd September, 1960 By an amendment of the plaint, another payment of Rs 1,000 by a similar draft from the first respondent from Ipoh dated 21st June, 1955 was set up It was specifically asserted in the plaint that this sum was received in part payment of the debt. The first respondent filed a counter-affidavit opposing the amendment But, there he merely mentioned that he did not admit the allegation that such a payment was made.

* Appeal No. 184 of 1962. 12th December, 1966.

The additional written statement filed by the first respondent was in no better terms. But, in the evidence, it was put in issue as to whether the sum of Rs. 1,000 paid was on account of the suit promissory note or some other transaction. The Court below found that this payment was not towards the promissory note and held that the suit was barred by limitation.

Before us the factum of payment of Rs. 1,000 by draft is not disputed. What is in controversy, however, is, whether the payment was towards the suit promissory note If it was, the further question would be whether that would, in any case, save limitation In our opinion, the last payment was clearly towards the suit promissory note, and we cannot accept the finding of the Court below to the contrary.

The bank draft was issued by the Chartered Bank of India, Australia and China and bore No. 54/258 dated 21st June, 1955, and was in favour of AL VR. ST Veerappa Chettiar The draft was addressed to the Indian Overseas Bank Ltd., on 4th July, 1955. There was an entry for the receipt in the family day-book, Exhibit 21, on the same day The recital of this entry was that it was credited towards the promissory note. Exhibit A-21 was a family account The bank pass-book, Exhibit A-22, which also pertains to the family, contains an entry relating to the receipt of this sum. It appears that along with the draft was sent a covering letter, which is not produced. There is, however, a reference to the sum of Rs. 1,000 in Exhibit A-5 dated 6th January, 1956, which was written by the first respondent to Veerappa Chettiar In this letter, while referring to the earlier payment on Ani 7th of Rs. 1,000 by bank draft, the first respondent said that the amount might be credited in the *Thanathu* account The letter further stated that the balance will be paid to the addressee and the debt cleared and it need not be mixed up with what was in common. This documentary evidence unmistakably shows that the sum of Rs 1,000 was credited towards the promissory note The Court below, however, considered that the reference in Exhibit A-5 to '*Thanathu*' account and certain mistakes crept into the entry in Exhibit A-21 relating to the receipt of Rs. 1,000 by draft, showed that the amount was not earmarked towards the promissory note but it was a payment on some other transaction We are unable to agree with this reasoning. The mistakes in the entry in the account book seem to be by inadvertence and are inconsequential. We are satisfied that the entry related only to the draft in question. There is no reason to doubt the genuineness of the account and the particular entry No doubt, Exhibit A-5 shows that the sum may be credited towards the '*Thanathu*' account. We are inclined to think that there must have been some kind of understanding between the first respondent and the addressee in regard to the promissory note debt and the addressee was particular that the amount should be paid into his hand Nevertheless, the addressee, when the amount was received, credited it is the family account and towards the promissory note. There is no reason to think that this entry was made with a view to create evidence. We are aware that the Receiver was not initially in possession of the fact relating to the last payment towards the promissory note. On 24th October, 1959, or so, Veerappa Chettiar handed over to the Receiver the records relating to the family By then, Veerappa Chettiar and his brothers were in litigation and the dispute was in appeal pending in this Court. It is possible that particular care was not taken in handing over to the Receiver all the papers or fully posting him with complete information. Having regard to the facts and circumstances we have mentioned, we place no reliance on the evidence of the first respondent that the sum of Rs 1,000 was paid towards some other account. He never set up that case at the earlierst opportunity. If his case was true, there is no explanation why he could not have mentioned it in the counter-affidavit in the application for amendment of the plaint, or at least in the additional written statement Except his assertion, there is nothing to show that the sum was paid towards a transaction other than the promissory note. We reverse the finding of the Court below and hold that the last payment of Rs. 1,000 was also towards the suit promissory note.

If that be the case, as we hold, the question then is, whether the suit was within time. The Court below finds that between 14th June, 1952, and 3rd September,

1960, the first respondent was away in Ipoh. It is common ground that if the plaintiff could have the advantage of section 13 of the Limitation Act, 1908, for the purpose of section 19, the suit would be within time. Mr. V. V. Raghavan for the first respondent contends that any part payment or acknowledgment made during the period extended in effect under section 13, will not avail for start of a fresh period of limitation under section 19 He says that the exclusion permitted by section 13 is only for the purpose of institution of a suit and cannot extend to part payment or acknowledgment of liability. To put it differently, his argument is that section 19 is not a computation section and that this provision merely says that if there is an acknowledgment of liability before the expiration of the period prescribed for a suit, a fresh period of limitation shall be available from such date. In our view, this contention cannot be accepted.

Section 3 of the Limitation Act, 1908, says that subject to the provisions in sections 4 to 25, a suit instituted after the period of limitation prescribed therefor by the First Schedule shall be dismissed Sections 14 to 18 provide for either addition or exclusion of time in the computation of the period of limitation If limitation expires during Court holidays, section 4 permits a suit or appeal or application to be instituted on the day the Court reopens. This is not a case of addition to the period of limitation. This section has nothing to do with the computation of the period of limitation and it does not extend the time prescribed All that the section does is to extend a concession, namely, that notwithstanding the expiry of the period of limitation during the holidays, the suit, appeal or application may be filed on the day the Court reopens. It follows, therefore, that where the limitation expires during the holidays, after that event and before the Court reopens, there is no question of making any acknowledgment as so to give a fresh start of limitation This is because an acknowledgment has to be made before expiry of the period prescribed for institution of a suit and the period of limitation having expired during the holidays thereafter there can be no acknowledgment of the debt merely because section 4 says that the suit may be filed on the day the Court reopens. But the case is different, as we think, under section 13 That relates to computation of time and allows exclusion of time in certain circumstances. The fact is that to the extent exclusion is allowed, there is in effect a *pro tanto* extension of the period of limitation, unlike under section 4 On account of such exclusion, during the resulting extended period of limitation so to speak, there can well be an acknowledgment under section 19. This, we think, is clear from the opening words of sub-section (1) of section 19, namely, " before the expiration of the period prescribed for a suit or application ". It is true the period of limitation prescribed is always the same. But when the law directs that in computing such prescribed period, exclusion of time should be allowed in certain circumstances, the period prescribed falls over a longer period than the time prescribed without exclusion. If, therefore, an acknowledgment is within the period of limitation prescribed, but as computed after exclusion, we do not see why it is not within the ambit of section 19 On that view, we think that the suit in within time.

The view we have taken receives support from *Sambayya* v. *Pedda Subbayya*[1] and *Subbaraya* v *Eswaramoorthy*[2]. These two cases, no doubt, relate to exclusion of time under different enactments, but, in our opinion, the principle is the same *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*[3] and *Jayarama Aiyar* v. *S. Rajagopalan*[4] to which Mr. Raghavan made reference, do not assist him, as they were concerned with the applicability of section 4.

The appeal is allowed The decree and judgment of the Court below are set aside and the suit is decreed with costs here and the Court below.

V.K. —— *Appeal allowed.*

1. (1937) 2 M L J. 703 . I L R. 1938 Mad. 439.
2. A I R 1963 Mad 202
3. (1935) 68 M.L.J. 665 (P.C.) . (1935) L.R. 62 I A 80 A I R 1935 P C 85.
4. I L R (1964) 2 Mad. 907 · A.I.R. 1965 Mad. 459.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M NATESAN.

Isakki Ammal *alias* Thayammai Ammal .. *Appellant**

v.

Pappammal and others .. *Respondents.*

Deed—Construction—Purported deed of settlement—If and when may be construed as partly operating as deed and partly as will —Interpretation of deeds—General principles .

A document can contain a legal declaration of the intention of the executant with respect to his property to take effect after his death notwithstanding that the document may contain other provisions to take effect during his lifetime A part of the instrument may operate *in praesenti* as a deed and another *in futuro* as a will If a deed is severable and part of it clearly testamentary, such part may take effect as a will though the remaining parts are not testamentary But the essential distinction and a necessary element to read a will in such a document is that the relative provisions must be severable. A will is in all cases revocable, even though the testator may declare it irrevocable Where an instrument is deed in form, there must be something very special in the case to justify its being treated as testamentary in character.

The cardinal rule of interpretation of deeds as well as other instruments is to look for the intention of the executant in the words of the document and for that purpose the language of the entire deed has to be taken into consideration As far as possible the interpretation should be such that effect is given to all the parts and no potion of the instrument is rejected. In the construction of a document the prime factor to be found is the intention of the executant as exprsssed in the deed The intention has to be gathered from the document itself, and if the words are express and clear, effect has to be given to them and there can be no extraneous enquiry as to what was thought or intended. But it is well esatablished that where there is ambiguity in the language employed it is permissible to look to the surrounding circumstances at the time of execution to determine what was intended to be conveyed by the language used Very often the status and training of the parties using the words have to be taken into consideration Very many words are used in more than one sense and the sense differs according to the circumstances and context.

Where the intention of the executant is clear but the language is ambiguous and when it appears from the context that a word must have been incorrectly employed by the testator in the place of some other word, the Court could read the word as it ought to be But of course in the guise of construction one cannot rewrite the deed and it is permissible to look for the intention only when the language is not clear Also extrinsic evidence of the intention is not admissible Only when there is doubt, evidence is permissible as to what the words mean or how they are to be applied to the circumstances of the executant

When considering whether the settlor intended a particular provision to be testamentary or not, one can properly refer to the specific provision by the settlor that he had no right to revoke the terms of the deed.

In the matter of construction of documents authorities and decisions on particular documents are not of much help They can be looked up as illustrations of the principles that should guide interpretation In the ultimate the effect of the words of any particular document has to depend upon the context in which the words have been used and would be conditioned by the tenor of the document.

The deed of settlement, on the facts and circumstances of the present case cannot, on its true construction, be regarded as partly operating *in praesenti* as a deed and partly *in futuro* as a testamentary disposition.

Appeal against the Decree of the District Court, Tirunelveli, in Appeal Suit No. 209 of 1960 preferred against the Decree of the Court of the District Munsif of Srivaikuntam in Original Suit No. 61 of 1959.

R. Ramamurthy Ayyar, for Appellant.

M. M. Ismail and *R G. Rajan,* for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal by the plaintiff raises a short but not an easy question in the construction of a deed. The Courts below have differed in their views. Briefly stated the point for decision is whether a purported deed of settlement is a composite instrument being a deed of settlement in respect of specified properties and a testamentary document in relation to the remaining properties of the settlor. The deed in question was executed by Arunachalam Pillai, a Hindu Vellala, residing at Palayamkottai, Tirunelveli district, on 21st April, 1927, as a

*S.A. No. 1027 of 1962. 9th September, 1966.

marriage settlement on the eve of his third marriage. The preamble to the document sets out the circumstances under which the document was executed. His first wife was dead and had left a daughter Isakki who had been married away. He had taken a second wife by name Meenakshi about 8 years previously ; but she had no issue and it is in these circumstances he sought the hand of the present plaintiff as third wife in the hope of continuing the line. She was his uncle's daughter, then just aged 16, and the deed recited that when the marriage proposal was made, her father insisted on settlement of some properties as a condition for the marriage, inasmuch as the second wife was living and there was besides the daughters by the first wife Items 1 and 2 of the plaint schedule were settled on her in the circumstances under the deed, the deed to take effect on the date of the marriage, the marriage being fixed about a fortnight ahead.

The operative portion of the deed provides for the settlor and the settlee to enjoy the properties jointly during their lifetime, the settlee living with the settlor. During the settlor's lifetime the settlee cannot by herself in any way encumber or alienate the properties Even so during the settlee's lifetime, the settlor was not entitled by himself to encumber or alienate the properties Then comes the clauses of the deed requiring construction. Having provided for the enjoyment of the settled properties during their lives, the deed proceeds to provide for the future devolution of the properties settled. Under the first clause after his and her lifetime, if she had male heirs they were to take the scheduled properties and his other properties with absolute rights. The construction contended for is that this clause is partly a transfer *in praesenti* under the settlement and partly a testamentary disposition.

It is contended that all the remaining properties of the settlor not the subject of the settlement are testamentarily disposed of by this clause. The next clause provides that if the settlee had only female heirs, the said female heirs and the settlors' first wife's daughter Isakki *alias* Thangathammal should partition (the properties) equally and enjoy. It is contended that these female heirs take and divide not only the properties, the subject of settlement but also the other properties of the settlor. The third clause provides that in the event of the settlee having no heirs she would take the properties scheduled under the deed with absolute rights. Then follows a clause providing against revocation of the settlement under any circumstance.

The settlor died about the year 1937 leaving no male issue even by his third wife, the present plaintiff. He had by her only a daughter by name Meenakshi now alive. The second wife is also dead and the first wife's daughter Isakki died in or about 1945 leaving her two children, defendants 1 and 2. The third defendant in the suit is the husband of the first defendant. The plaintiff has come forward with this suit basing her title to the properties set out in Schedules 3 to 8 in the plaint as heir to the deceased Arunachalam Pillai. She contends that the estate which she had inherited from her husband on his death in these properties has, under the Hindu Succession Act XXX of 1956, become enlarged into an absolute and heritable estate. Schedules 1 and 2 to the plaint are the properties which were settled on her by her husband and she claims a life interest in the same. It is alleged by her that defendants 1 and 2 are setting up title to the properties described in Schedules 3 to 8 as co-owners along with her Possession is sought from the defendants of the properties described in Schedules 3 and 5 and declaration of her title and injunction is sought in respect of the other properties. A shop has been constructed on the 5th Schedule item. The trial Court which found for the plaintiff on the construction of the deed, decided that the construction of the shop was by defendants 1 and 2 at their expense and before the plaintiff could have possession of the 5th schedule item, she should pay a sum of Rs. 2,000 as compensation to defendants 1 and 2 The appellate Court which has found against the plaintiff on the construction of the deed, finds on the merits that the plaintiff need not compensate defendants 1 and 2 for the construction of the shop as she had herself spent for the construction. As desired by the parties, the property set out in Schedule 8 has not been the subject of relief. The learned District Judge on his interpretation of the deed, has held that the plaintiff will be entitled to a life estate only in all the properties, that is even in the

properties described in Schedules 3 to 7, defendants 1 and 2 having a half right in the vested remainder along with the plaintiff's daughter. In that view, possession had been directed to be delivered to the plaintiff of the 3rd and 5th scheduled properties. Her possession of the properties for her lifetime is protected by injunction.

The short though not simple question for decision is whether on its true construction the document Exhibit A-1 while being a deed of settlement operating *in praesenti* on the properties set out in Schedules 1 and 2 of the plaint, is also a testamentary document in respect of the remaining plaint items. That a document can be partly testamentary and partly immediately effective as a settlement is not in dispute. A document can contain a legal declaration of the intention of the executant with respect to his property to take effect after his death notwithstanding that the document may contain other provisions to take effect during his lifetime. A part of the instrument may operate *in praesenti* as a deed and another *in futuro* as a will see *Chandmal* v. *Lachmi Narain*[1]. If a deed is severable and part of it clearly testamentary, such part may take effect as a will, though the remaining parts are not testamentary. But the essential distinction and a necessary element to read a will in such a document is that the relative provisions must be revocable " A will is in all cases revocable, even though the testator may declare it irrevocable." Theobald on Wills, 12th Edition, para. 78, page 28. Also as pointed out by this Court in *Ignatia Brito* v. *Rego*[2], where an instrument is deed in form, there must be something very special in the case to justify its being treated as testamentary in character. Now bearing in mind that a document could be ambulatory and testamentary in part and effective as a settlement in part, I shall proceed to construe the relevant clauses.

The cardinal rule of interpretation of deeds as well as other instruments is to look for the intention of the executant in the words of the document and for that purpose the language of the entire deed has to be taken into consideration. As far as possible the interpretation should be such that effect is given to all the parts and no portion of the instrument is rejected. In the construction of a document the prime factor to be found is the intention of the executant as expressed in the deed. The intention has to be gathered from the document itself, and, if the words are express and clear, effect has to be given to them and there can be no extraneous enquiry as to what was thought or intended. But it is well established that where there is ambiguity in the language employed it is permissible to look to the surrounding circumstances at the time of execution to determine what was intended to be conveyed by the language used. Very often the status and training of the parties using the words have to be taken into consideration. Very many words are used in more than one sense and the sense differs according to the circumstances and context. It was stated by Sir Gorrell Barnes, P. in the testamentary suit, *Simpson* v. *Foxon*[3],

> "But what a man intends and the expression of his intention are two different things He is bound and those who take after him are bound by his expressed intention If that expressed intention is unfortunately different from what he really desires so much the worse for those who wish the actual intention to prevail."

In *River Wear Commissioners* v. *Adamson*[4], Lord Blackburn sets out the rule thus:

> "In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were in reference to which the words were used and what the object appearing from these circumstances which the person using them had in view, for the meaning of words varies according to the circumstances in respect of which they were used.

To construe the settlement deed in the present case Exhibit A-1, we have this that it is an instrument duly stamped and registered as a deed of settlement of specified properties. The settlor was out only to settle specified properties for his would be third wife and not generally provide for the devolution of all his properties. Exhibit A-1 sets out in the Schedule the properties which are the subject of the settle-

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1. I L R. (1900) 22 All 162
2. (1933) 64 M L J. 650 at 652.
3. L R (1907) Probate 54 at 57.
4. L.R. (1877) 2 App. Case 743 at 763.

ment. The occasion for bringing up the instrument is set out in the preamble portion. On behalf of the plaintiff who was taken as third wife, her father had insisted on settlement of properties. The instrument is executed on the eve of the marriage and the deed itself states that it is a marriage settlement As regards the properties settled the deed first deals with the rights of the settlor and settlee therein during their lifetime. The controversial part of the document starts when providing for the subsequent devolution of the properties settled. The relevant clauses run thus:

" என்னுடையவும் உன்னுடையவும் ஆயுசுக்குப்பின் உனக்கு ஆண் வாரிசுகள் இருந்தால் அவாகள் தபசல் சொததுக்களையும் மற்றும் என் சொத்துக்களையும் சர்வசுதந்திரபாத்தியமாய அடைந்து கொள்ள வேண்டியது பெண் வாரிசுகள் மட்டுமிருந்தால் மேற்படி என் பெண வாரிசுகளும், என் 1-வது தர ஸ்திரியின் இசக்கியென்ற தங்கத்தம்மாளுமாக சமமாக பிரித்து ஆண்டு அனுபவித்துகொள்ள வேணடியது. உனகடு சந்ததியே ஏற்படாத பட்சத்தில் என் ஆயுசுக்குப்பின் சொத்தை' நீயே சர்வசுதந்திர பாத்தியமாய் ஆண்டு அனுபவித்துக் கொள்வஏயாகவும் இந்த செட்டல் மெண்டை நான் நல்ல எணணத்துடன் பிறப்பித்துக் கொடுத்திருப்பதால் எவ்வித காரணத்தை யிட்டும் இதை ரத்து செய்ய எனக்கு அதிகாரமில்லை "

The first three clauses have to be read together, a single thought pervades the provisions, and when read through one sees gaps and ambiguity. In the event of the settlee having male heirs while providing that the male heirs shall take an absolute estate in the properties settled after the lifetime of the settlor and settlee on a first reading it reads as if it is further provided that they shall so take the other properties of the settlor also. A single verb serves for both sets of properties I am asked to read in this clause a testamentary disposition in respect of the remaining properties of the settlor I will then be reading a single clause in the instrument partly as testamentary and partly as a deed. Now this clause provides for devolution after the lifetime of both the settlor and settlee With reference to the properties specified and settled there can be no difficulty or doubt in applying the clause. The survivor of the two spouses takes a life estate with remainder over to the male heirs. A marriage settlement quite commonly takes that form. The position gets complicated when I have to construe the clause with reference to the remaining properties of the settlor. The learned District Judge interprets this clause as giving a life estate in them to the settlee after the lifetime of the settlor if she outlives him. The sons do not inherit even these properties on the death of the father; they take the properties only after the lifetime of the widow, just as in the case of the settled properties. It is this interpretation that makes me hesitant to fall in with the lower Court. No doubt if the settlor outlives the settlee, on his death, whether the clause is given effect or ignored in relation to the other properties, the sons take the other properties absolutely as heirs. In the event of the settlee outliving the settlor, there is no specific provision vesting the other properties on the settlee or for that matter on anyone else in the interregnum. The words by themselves if given effect to only postpone the sons for the lifetime of their mother and it is contended for the defendants that they will meanwhile vest in the settlee for her life like the settled properties. To this the argument on behalf of the plaintiff is that the settlor had not embarked on making any testamentary disposition then to attribute to him an intention to postpone the vesting of his properties on his male heirs for the lifetime of the plaintiff. It is argued that this is to find in him an unreasonable or capricious intention. He was anxious to get a son. He was taking a third wife to have male progeny. It was not any infatuation for the girl that brought about the settlement. Certainly he was not anticipating that the male progency expected would be wayward. Why then should he postpone his sons inheriting his other properties on his death ? If they are postponed to take after their mother they may be postponed for decades, they may become grandfathers before they get their fathers' estate. Then there was the second wife alive and it is pointed out for the plaintiff that there is absolutely no evidence of any other provision having been made for her maintenance May be she has had no issue, but only eight years had elapsed after her marriage and why should one presume that he was ignoring her altogether, Learned Counsel for the plaintiff argues that the circumstances do not warrant

imputing a testamentary intent to the settlor in this clause ignoring just and lawful claims and demands on his dispositive powers. It is submitted that the reference to the other properties of the settlor is only by way of illustrating the absolute character of the estate that would be taken by the sons only emphasising the estate they would be taking Whether it has any significance or not, the language used in relation to the female heirs is different and this may explain the need for illustration. Hence I may refer to the observations in *Patch* v. *Shore*[1] :

"The rule is, that if an instrument be a deed in its form in order to hold it is testamentary, or in the nature of a will, there must be something very special in the case, it must even go to this extent that it was the intention of the settlor that the instrument was to be ambulatory till his death, and then to operate at all events, or that he intended the instrument to be a will, *animo testandi.*"

The test of revocability may be satisfied in this case, as the document states that the executant has no power to revoke the settlement and the clause may be confined to the settled properties. But all the same when both the classes of properties, the properties settled as well as the other properties are dealt with by a single clause to construe that the same words apply *in praesenti* in respect of one set of properties and are testamentary in respect of different set of properties, the language and the occasion must be compelling The question is, do the language and circumstances of its user call for such drastic departure by interpretation. I do not see why, if without violence to the language the reference to the other properties can be read as merely a statement of a fact that will happen a construction involving an unlikely intention should be adopted. The language of the provision does not compel that both the sets of properties must be taken at the same time, that is, after the death of the settlor and his wife It seems to me that the settlor only points out that the male heirs will be taking his other properties absolutely and provides that along with those properties they shall take the settled properties also absolutely after the lifetime of the mother the settlee. The settlor expresses his wish that the settled properties should follow the devolution of his other properties. He was not by the document providing for the devolution of his other properties. Clearly however read he has made no provision with reference to the remaining properties in the event of the settlee having neither male nor female heirs. This is a pointer that the settlor may not be on the subject of disposition of his other properties then. The reference to the other properties can be read as reference to an event that will happen on the death of the settlor, "*மற்றும் என் சொத்துக்களையும்*" just means "*மற்றும் என் சொத்துக்களைப போல்*"—that is the sons will take the settled properties absolutely even as they would take his other properties. In Williams on Executors and Administrators, 14th Edition, Volume 2, it is pointed out at page 512 .

"Where the words of the will are unambiguous they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable, but where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous result A testator must not be presumed to intend an absurdity, but, if shown by the context or by the whole will to have so intended, the intention, if not illegal, must be carried out"

The principles applicable in the construction of a deed are not different. To accede to the construction adopted by the appellate Court is to ascribe to the testator who has been so anxious to get a son a desire not in consonance with the normal wishes and attitudes of the class of people to which the testator belongs. A Court construing an ambiguous document cannot shut out such considerations. Where the language is not clear, I am not prepared to impute such an intention to the settlor in the case in the year 1927, and the construction should not be guided by the subsequent events and the need for what may be considered an equitable and rational interpretation in the state of things now obtaining. I am not taking into consideration the argument of learned Counsel for the plaintiff that the properties were ancestral I am on the construction of the deed and at the time he executed the deed even if the properties were ancestral, he was the sole coparcener absolutely entitled to the properties and would not have imagined that the birth of a son would

1. (1862) 2 Dr. & Sm. 589. 143 R.R. 283.

fetter his disposal of the properties. But all the same I do not think that any Hindu could postpone his son taking his estate after him for the lifetime of his widow, when the son is yet to be born and nothing can be predicted about him. Where the intention of the executant is clear but the language is ambiguous and when it appears from the context that a word must have been incorrectly employed by the testator in the place of some other word, the Court could read the word as it ought to be. Illustrative of the limits to which the Court will go in construing a document I may quote Williams on Executors and Administrators, 14th Edition, Volume 2, at page 516, referring to *Forth* v. *Chapman*[1].

"Thus, in *Forth* v *Chapman*[1], where the testator deviced real and personal estate to *A*, and if he should die and *leave no issue of his body*, then to *B* Lord Maclesfied said that it might be reasonable enough to take the same words as to the different estates of reality and personality in different senses, and as if repeated by two several clauses and that the words, " have no issue " as applied to the *personal* estate should be taken to mean, leave no issue *at the time of his death*, but as applied to the freehold to mean an *indefinite failure of issue* "

Chief Baron Kelly observed thus in *Gwyn* v. *Noath Canal Co.*[2],

"The result of all the authorities is that when a Court of law can clearly collect from the language within the four corners of the deed or instrument in writing the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used and by rejecting as superfluous whatever is repugnant to the intention so discerned ".

Odgers in his Treatise, Construction of Deeds and Statutes, 4th Edition, at page 48, gives another illustration .

"For instance in a marriage settlement the intention was to provide for all children, sons and daughters and the Court effected that intention by transposing the clause creating the power to make provision for younger children and that containing the limitation to the daughters in the event of there being no son ; whereby the words ' such younger children ' would include both sons and daugthers."

But of course in the guise of construction one cannot rewrite the deed for the executant and it is permissible to look for the intention of the executant only when the language is not clear and it becomes necessary to find out what the executant was at by the words used Also extrinsic evidence of the intention is not admissible. Only when there is doubt, evidence is permissible as to what the words mean or how they are to be applied to the circumstances of the executant. In my reading of the document, the executant has not expressed any testamentary intent by the words in question.

To go to the next clause, the clause applicable in the events that have happened, I agree with learned Counsel for the defendants that the clause providing for the contingency of the settlee having only female heirs must be read along with the preceding clause and goes with it. This provision as the previous one comes into effect after the lifetime of the settlor and the settlee. In the event of the settlee having female heirs, her female heirs and the first wife's daughter have to take the properties equally. The question is do these female heirs take both sets of properties equally. It is contended for the plaintiff that even if the first clause should be read as containing a testamentary disposition in respect of the other properties, this clause does not necessarily take in the testamentary disposition. Learned Counsel contends that this can refer only to the scheduled properties. But Counsel for the defendants draws my attention to the very next clause where the contingency of the settlee having neither male or female issue is dealt with. That clause provides that the settlee shall take the scheduled properties absolutely. If it should be held that the first clause is partly dispositive in character, it is difficult to hold that the second clause does not take in the other properties and make a testamentary disposition of them in the contingency contemplated therein. The second clause makes no reference whatever to the properties. It is understood in the context and the properties which are to be shared equally under that clause must only be the two sets of properties, referred to in the preceding clause.

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1. I.P. Wens. 667. 2. (1868) L.R. 3 Ex. 209 at 215.

The several clauses show a continuity of thought. To me it seems that a single subject-matter to deal with, devolution of properties after the lifetime of both is meant.

The specific reference in the third clause to the settled properties is only by way of emphasis and not in contrast with the subject-matter of the clauses preceding. The clause immediately following the third clause refers to the document as a settlement and then follows the provisions against revocation. No doubt as stated earlier, if the disposition is testamentary, the mere fact that the testator has stated that it was irrevocable, will not stand in the way of revocation. But when considering whether the settlor intended a particular provision to be testamentary or not, one can properly refer to the specific provision by the settlor that he had no right of revocation of the terms of the deed and here the terms are not clearly severed. To read the reference to the taking of the other properties absolutely as merely setting out a fact that will happen and indicating separately that the male heirs will have the same absolute estate in the settled properties will be giving effect to all the provisions of the deed and will be reading the document as a whole. No words will get omitted and no unintelligible and unreasonable effect will be given to the provisions of the deed. It is not contended that the document effects a settlement of the properties not specified in the schedules thereunder. It cannot be in view of sections 21 and 22 of the Indian Registration Act.

For the defendant reference is made to *Ramautar Singh* v. *Ramsundari*[1]. In the matter of construction of documents authorities and decisions on particular documents are not of much help. They can be looked up as illustrations of the principles that should guide interpretation In the ultimate the effect of the words of any particular document has to depend upon the context in which the words have been used and would be conditioned by the tenor of the document. In *Ramautar Singh* v. *Ramsundari*[1], the testamentary clause and the dispositive clause in regard to the gift were distinct and separate, and there was no doubt that the donor's dominant intention was to pass his other properties also after his death to the donee. It is pointed out in that case that the intention of the executant in respect of the other properties was not at all obscure.

I am conscious that the construction which I find myself constrained to adopt may be having an effect which would not have been dreamt of by the settlor in view of the Hindu Succession Act XXX of 1956. If the settlor could be consulted today he may vehemently assert in the background of the subsequent events and legislation that his intention was as now interpreted by the appellate Court. But the document has to be construed not in the light of events that have subsequently happened and the laws that have been subsequently passed. But for Act XXX of 1956 the plaintiff will be having only a woman's estate in the other properties of the settlor as his heir on the construction of the document which I am inclined to take agreeing with the trial Court. Now by virtue of the Act the plaintiff will take the properties set out in Schedules 3 to 7 as absolute owner.

The Second Appeal has to succeed. The variation of the decree of the lower appellate Court necessitated by the view I take is to grant the plaintiff a declaration that she is entitled to the properties set out in Schedules 3 to 7 of the plaint absolutely in substitution of the limited declaration granted by the appellate Court in clause 1 of its decree. The finding of the learned District Judge as to the construction on Schedule 5 properly is a finding of fact. Therefore in other respects the decree and judgment of the lower appellate Court have to stand affirmed. The Second Appeal is allowed to the extent indicated above. In the circumstances of the case the parties will bear their respective costs throughout.

Leave granted.

V.K. *Appeal allowed in part.*

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1. A.I.R. 1959 Pat. 585.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Venkataraman .. *Petitioner**

Criminal Procedure Code (V of 1898), section 195 (1) (a)—Offence under section 175, Penal Code—Complaint under section 195 (1) (a) of Criminal Procedure Code—By whom should be filed

The petitioner, a karnam, was placed under suspension by the Revenue Divisional Officer and another person was asked to take charge from him The petitioner, however, refused to hand over the records to the new karnam who reported the matter to the Tahsildar The Tahsildar filed a complaint to the Sub-Magistrate for prosecution of petitioner under section 175, Penal Code On the question of competency of the complaint,

Held, the complaint filed by the Tahsildar was competent

The argument that the complaint to be competent under section 195 (1) (a) of Criminal Procedure Code, should have been filed by the Revenue Divisionl Officer is untenable The public servant concerned referred to in section 195 (1) (a) was only the new karnam and it was to him that the petitioner was legally bound to hand over the records though such obligation arose out of the order of the Revenue Divisional Officer Hence the new karnam or the Tahsildar to whom he was a subordinate was competent to file the complaint.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith on the file of the High Court, the High Court will be pleased to quash the proceedings in C C No. 2179 of 1966 on the file of the Court of the Sub-Magistrate, Tirukoilur.

T. S. Arunachalam, for Petitioner.

The Court made the following

ORDER.—This is a petition under section 561-A, Criminal Procedure Code, to quash the proceedings instituted against the petitioner, in C.C. No. 2179 of 1966 on the file of the Sub-Magistrate, Tirukoilur. The petitioner Venkataraman was the karnam of Alur group of villages in Tirukoilur Taluk. For dereliction of duty, the Revenue Divisional Officer placed him under interim suspension, pending framing of charges against him, and directed the karnam of Sholavandapuram to be in additional charge of Alur group *vice* the petitioner. The petitioner, however, refused to hand over the records to the karnam of Sholavandapuram. That karnam reported the matter to the Tahsildar The Tahsildar filed a complaint before the learned Sub-Magistrate under section 175, Indian Penal Code. That is C.C. No. 2179 of 1966. The objection which the petitioner took before the learned Magistrate was that in view of the provisions of section 195 (1) (a) of the Criminal Procedure Code, the complaint filed by the Tahsildar was incompetent and that only the Revenue Divisional Officer, who passed the order of suspension, or some higher authority could have filed the complaint. This objection was overruled by the learned Sub-Magistrate. The same objection is repeated before me.

Section 195 (1) (a), Criminal Procedure Code enacts:

"No Court shall take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate"

Section 175, Indian Penal Code reads thus :

"Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to five hundred rupees or with both."

Under section 195 (1) (a), Criminal Procedure Code, the complaint had to be in writing of the public servant concerned or of some superior officer. Now the public servant to whom under section 175, Indian Penal Code, the petitioner was bound to hand over the records was the Karnam of Sholavandapuram. Hence the karnam of Sholavandapuram or the Tahsildar to whom he was a subordinate could file the complaint, and it was the Tahsildar who has actually filed the complaint. The complaint is therefore competent.

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* Crl.Mis. P.No. 3157 of 1966. 30th November, 1966.

The argument of Sri T. S. Arunachalam, the learned Counsel for the petitioner, that the complaint should have been filed by the Revenue Divisional Officer or some higher authority, proceeds on the footing that the public servant concerned, referred to in section 195 (1) (*a*), Criminal Procedure Code, is the Revenue Divisional Officer. This is a wrong assumption, because the public servant concerned should be fixed with reference to section 175, Indian Penal Code. The public servant concerned is only the karnam of Sholavandapuram, because it was to him that the petitioner was legally bound to hand over the records. It may be that his obligation to produce the records arose from the order of the Revenue Divisional Officer. But all the same the public servant to whom the petitioner was bound to hand over the records was only the karnam of Sholavandapuram.

The learned Counsel for the petitioner has relied upon two decisions. (1) In re *Muse Ali Adam*[1], and (2) *Santi Lal Mehta* v. *Emperor*[2]. These cases are, however, clearly distinguishable. In In re *Muse Ali Adam*[1], the accused was charged under section 183, Indian Penal Code, with the offence of offering resistance to the lawful authority of a public servant by obstructing the execution of a warrant of the Court of the Subordinate Judge. The charge was prosecuted by one Muse Ali Adam with sanction of the Subordinate Judge, and was permitted to be withdrawn. It was held that the complainant spoken of in section 210, Criminal Procedure Code, must be deemed to be the Court resisted and not the person injured through the resistance, and that consequently, it was the Subordinate Judge alone who was competent to withdraw The complainant was the Subordinate Judge the execution of whose warrant was resisted Here the public servant concerned is the karnam of Sholavandapuram to whom the records had to be handed over.

In *Santi Lal Mehta* v. *Emperor*[2], the accused was prosecuted under section 188, Indian Penal Code, for disobedience of a prohibitory order passed under section 144, Criminal Procedure Code, by the Commissioner of Police, prohibiting the carrying of daggers and other weapons. The proceedings were, however, initiated only by the Sub-Inspector of Police. It was held that the public servant concerned within the meaning of section 195 (1) (*a*), Criminal Procedure Code, who had to institute the complaint was the Commissioner of Police or some higher authority. That was because the public servant concerned was fixed in that case with reference to section 188, Indian Penal Code, which runs.

> "Whoever, knowing that, by an order promulgated by a public servant lawfully empowerd to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both"

The public servant there, for the purpose of section 195 (1) (*a*), Criminal Procedure Code, was the Commissioner of Police, who promulgated the order. The determination of the public servant concerned will vary according to the particular offence concerned.

In the result, the petition is dismissed.

V.K. *Petition dismissed.*

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1. (1877-78) I.L.R. 2 Bom. 653.
2. A.I.R. 1948 Cal. 103.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N KRISHNASWAMY REDDY.

Hajee Abdul Latheef .. *Petitioner**

v.

Sri Sarguru Sarva Samarasa Sangam by its President Ramaswami Adigal and others .. *Respondents.*

Contract Act (IX of 1872), section 23—Contract for transport of persons by lorries—Lorries plying without permit—Contract if illegal—Owner of lorries if precluded from claiming hire charges.

Where under a contract between the plaintiff and the defendant the plaintiff transports in his lorries certain persons from one place to another, the fact that the lorries plied without a permit, in violation of the provisions of the Motor Vehicles Act, will not render the contract illegal under section 23 of the Contract Act as to preclude the plaintiff from claiming the hire charges from the defendant. To invoke section 23 it must be shown that the agreement is made for illegal purposes or that it is against the public policy The defendant by virtue of the contract is concerned only with the transport of persons and not as to how and in what manner they are transported The illegality in the performance of the contract cannot be equated with a contract made for illegal purposes

St. John's Shipping Corporation v. *Joseph Bank, Ltd*, (1963) 3 All E R. 683, relied on.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the Subordinate Judge of Nilgiris, dated 28th July, 1964 and passed in S.C.S. No. 451 of 1963.

A. K. Sreeraman, for Petitioner.

P. S. Balakrishna Iyer and *P. S. Ramachandran,* for Respondents.

The Court delivered the following

JUDGMENT.—This Revision Petition has been filed by the plaintiff against the Judgment and Decree of the learned Subordinate Judge of Ootacamund dismissing a portion of the claim made by the plaintiff in S.C No. 451 of 1963.

The plaintiff filed the suit for recovery of a sum of Rs. 1,773 being the lorry hire charges due from the defendants. The first defendant in the suit Sri Sarguru Sarva Samarasa Sangam represented by its President Ramaswami Adigal, was a registered Sangham at Coonoor of which the second respondent was its President. The third defendant was the Sixth All-Tribal Welfare Board represented by its Secretaries. The case of the plaintiff is that the defendant requested the plaintiff who is a lorry owner to transport Hill Tribes from various parts of the hills to Ootacamund between 20th May, 1960 to 23rd May, 1960 when All-India Tribal Welfare Board had its conference, at Ootacamund. The plaintiff plied four lorries and transported Hill Tribes to the conference at Ootacamund and on that account he made a claim for Rs. 1,173-06 as arrears due to him. The second defendant has personally undertaken to pay the arrears and therefore he was personally liable for the amount claimed by him.

The first defendant, Sri Sarguru Sarva Samarasa Sangam resisted the claim stating that it had nothing to do with the Tribal Conference and that there was no contract between the first defendant Sangham and that he was not personally liable for any claim made by the plaintiff, and if the plaintiff had any relief, he should proceed against the third defendant, namely, the All-India Tribal Welfare Board. The second defendant also disputed the quantum of arrears and refuted some of the items claimed by the plaintiff. The third defendant, represented by one of the Secretaries filed a written statement stating that the Board had nothing to do with the alleged transactions and that he was an unnecessary party to the suit.

The learned Subordinate Judge dismissed the suit against the first defendant, but he held that the second defendant was personally liable for the claim made by the plaintiff and that the third defendant was also liable for the claim Regarding the quantum of the claim made by the plaintiff, the learned Subordinate Judge disallowed a portion of the claim and decreed the suit against defendants 2 and 3 for

* C.R.P. No. 2370 of 1964. 9th December, 1966.

a sum of Rs. 494 94 with proportions costs., Three items of amounts were disputed by the defendants, namely :—

" 1. The hire charges due for the lorry MDN No. 3534

2. A sum of Rs. 140 which was claimed by the plaintiff as waiting charges for two lorries for two days, and

3. A sum of Rs. 81-06. "

The learned Subordinate Judge, so far as item No. 2 is concerned, held that there was no contract between the parties that waiting charges should be paid and in the absence of such a contract the claim for Rs 140 on that count cannot be sustained. Learned Counsel for the petitioner is unable to show as to how the plaintiff was entitled to this sum in the absence of an agreement. This portion of the claim has been rightly disallowed. Even with regard to item No. 3 Rs. 81-06, I am of the opinion that this has also been rightly disallowed. In the ledger filed by the plaintiffs marked as Exhibit P-2, this item of the claim has not been entered and the plaintiff has not satisfactorily proved the claim for this amount. I therefore do not find any reason to interfere with the findings of disallowing the claim of Rs. 140 and Rs. 81-06 covered by items 2 and 3.

So far as item No. 1 is concerned, namely, the hire charges claimed by the plaintiff for the lorry MDN No. 3531, the contention of the defendants is that this lorry never plied for this conference and that it had no permit at all by the Regional Transport Authority to ply. The learned Subordinate Judge upheld the contention of the defendants and disallowed the claim There cannot be any dispute that the lorry MDN No. 3531 had no permit to ply for the conference. Exhibit B-1, the copy of the proceedings of the Collector of the Nilgiris dated 19th May, 1960, shows that the lorry had no permit to ply for conference. The learned Subordinate Judge found that even if the lorry was utilised for carrying persons for the conference, the claim is unsustainable on the ground that the transport was illegal. He also observed that the plaintiff had not produced his trip sheet to show that the lorry had actually plied.

Learned Counsel for the petitioner contends that the finding of the learned Subordinate Judge that the claim of hire charges for the lorry MDN No. 3531 was illegal is not correct as the claim was not made on an illegal contract. I see there is force in this contention. The learned Subordinate Judge, in disallowing the claim on the ground of illegality was probably having in his mind section 23 of the Indian Contract Act. According to the contract, the defendants are interested only in the transport of Hill Tribes to the conference and there is nothing illegal in the contract itself nor can it be said that any public policy is involved. It is true that if the lorry had plied without a permit it will be an offence under the provisions of the Motor Vehicles Act. The right to claim the hire charges by the plaintiff is not based on the offence committed by him but it is based on fulfilling his part of the contract. namely, transporting the Hill Tribes to the conference. To invoke the provision of section 23 of the Indian Contract Act, it must be shown that the agreement is made for illegal purposes or that it is against the public policy. The defendants by virtue of the contract are concerned only with the fact of the Hill Tribes being brought to the conference by lorries and not as to how and in what manner they are brought. The illegality in the performance of the contract cannot be equated with a contract made for illegal purposes. This principle has been clearly and succinctly stated in *St. John's Shipping Corporation* v. *Joseph Bank, Ltd.*[1]. The facts of the case are that the plaintiff conveyed a cargo of wheat under a contract with the defendant from America to England in their ship which was overloaded The overloading of the ship was an offence. The plaintiffs were charged and a fine was imposed on the plaintiffs in respect of the offence. It was found that by overloading the plaintiffs had earned a freight of £2,295. The defendants who were endorsees of the bill of lading paid a part of the freight for their share but withheld £2,000 of the total freight contracted to be paid by them in view of the

1. (1956) 3 All E.R. 683.

overloading. The defendants contended that the contract was unenforceable by reason of illegality, namely, overloading. In allowing the claim made by the plaintiffs Delvin, J., had observed as follows :

(1) The overloading of the ship was an infringement of law that was not contemplated by the contract which did not render the contract unenforceable for illegality,

(2) the plaintiffs had to prove that the goods were delivered safely and need not prove that they committed an illegal act, namely, by overloading in delivering the goods, and

(3) the plaintiffs were not barred from recovering the freight by the fact that the overloading was a crime, as the right to the freight was not brought into existence by the crime.

It is therefore very clear that the right to claim the hire charges by the plaintiff does not arise from the illegal performance of the contract *viz*, transporting persons by a lorry which had no permit, but arises from the fulfilment of the contract itself that the Hill Tribes are to be transported for the conference. The finding of the learned Subordinate Judge that the claim is illegal is not correct and has therefore to be set aside It is necessary that the Court must go into the question whether in fact the lorry MDN No. 3135 was used for transporting Hill Tribes and if so what was the amount the plaintiff will be entitled to as hire charges Though the plaintiff had not produced the trip-sheet, it is possible that he may let in any other evidence to substantiate his case. The finding relating to item No. 1, namely, the claim of hire charges for lorry No MDN 3135 is set aside and the revision petition is partly allowed. The suit will be remanded to the lower Court for fresh disposal according to law. The parties will be at liberty to adduce fresh evidence.

Costs of the parties to abide by the result in the lower Court.

V.K. — *Order accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY

Poovathai Udayyar and others .. *Petitioners**

Criminal Procedure Code (*V of* 1898), *section* 479-*A* (1)—*Perjury in judicial proceedings—Initiation of action—Proper procedure.*

It is very clear from section 479-A (1) of the Criminal Procedure Code that the Court intending to make a complaint is required to record a finding at the time of delivering the judgment that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evil of perjury and in the interests of justice, it is expedient that such a witness should be prosecuted for the offence. This provision is mandatory. Even if the Court finds that a person has deliberately given false evidence, it will not be a sufficient compliance of secion 479-A unless it also finds that a prosecution is necessary for the purpose of eradicating the evil of perjury and that it is expedient in the interests of justice. In the absence of a finding as required under section 479-A (1) the order of sanctioning the prosecution cannot stand.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sessions Judge, North Arcot Division at Vellore in Crl.M P. No. 565 of 1965 in S C. No. 19 of 1965, dated 17th November, 1965.

T S. Arunachalam, for Petitioners

S. R. Srinivasan, for Public Prosecutor, for State

The Court made the following

ORDER.—This revision petition has been filed against the order of the learned Sessions Judge of North Arcot Division at Vellore preferring a complaint against the petitioners for having given false evidence in S.C No 19 of 1965.

The petitioners were witnesses in a case of murder tried by the learned Sessions Judge. The learned Judge found that the petitioners have deliberately given false evidence and while delivering judgment acquitting the accused he observed that

* Crl.R C. No. 1534 of 1965. (Crl.R. P.No. 1509 of 1965). — 16th December, 1966.

necessary action might be taken against the petitioners, P.Ws. 1, 2, 6 and 7, who had perjured before him. Subsequently, a petition was filed by the Sub-Inspector of Police, Vellore, praying for the prosecution of the witnesses for perjury. Notice was given to the petitioners on this application. The petitioners contended before the learned Sessions Judge that the petition was not maintainable as a definite finding was not given in the judgment at the time of its pronouncement as required under section 479-A of the Criminal Procedure Code. The learned Sessions Judge negatived the contention of the petitioners and ordered institution of complaint against the petitioners for perjury.

The learned Counsel for the petitioners reiterates the same contention raised before the learned Sessions Judge that the requirements under section 479-A of the Code of Criminal Procedure were not complied with while sanctioning the prosecution and that the order of the Court below is illegal. There is force in this contention. Section 479-A (1) so far as it is material to the present case, is in these terms :

"When any . criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceedings. . .... . and that, for the eradication of the evils of perjury. . . .and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof."

It is very clear from the provisions of this sub-section that the Court intending to make a complaint is required to record a finding at the time of delivering the judgment that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of evil of perjury and in the interests of justice, it is expedient that such a witness should be prosecuted for the offence. This provision is mandatory. Even if the Court finds that a person has deliberately given false evidence, it will not be a sufficient compliance of section 479-A unless it also finds that a prosecution is necessary for the purpose of eradicating the evil of perjury and that it is expedient in the interests of justice. It may be in certain cases a Court may not sanction prosecution for perjury if it finds after applying its mind to the various circumstances available before it that it is not expedient In *Dr. Pal Chaudhry* v. *State of Assam*[1], the Supreme Court has held that in the absence of a finding as required under section 479-A(1) the order of sanctioning the prosecution cannot be allowed to stand.

The learned Sessions Judge in this case has of course found that the petitioners have deliberately given false evidence, but he has not given a finding that the prosecution of the petitioners for perjury was necessary for the eradication of the evils of perjury and that it was expedient in the interests of justice that the petitioners should be prosecuted. The order made by the learned Sessions Judge was in breach of the express provision of section 479-A (1).

The result therefore is that the order of the learned Sessions Judge is set aside and the revision is allowed.

V.K. *Revision allowed.*

1. (1960) S.C.J. 1079 (1960) 2 An.W.R. (S.C.) (S.C.) 69. A.I.R. 1960 S.C. 133. 69 : (1960) M.L.J. (Crl.) 691 : (1960) 2 M.L.J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE T RAMAPRASADA RAO.

The Union of India owning the Southern Railway by its General Manager, Madras .. *Petitioner**

v.

G. V. Parthasarathy Chetty and others .. *Respondents.*

Railways Act (IX of 1890), sections 73, 77—Endorsee of railway receipt—If can sue railway in his own name.

An endorsee of a railway receipt would have *locus standi* to maintain an action against the railway for loss caused to the goods only if he is able to show that there had been a transfer of title to the goods which the said railway receipt represents in his favour and that he is holding the receipt which is considered to be a document of title, as the consignee of the goods.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Decree of the Court of the Small Causes (Full Bench), Madras, dated 10th July, 1964 and passed in N T.A. No. 42 of 1964 (S.C.S. No. 8276 of 1962, Court of Small Causes, Madras).

M. M. Ismail and *N. Maninarayanan*, for Petitioner.

V. Venkataseshayya and *S. Veeraraghavachariar*, for Respondents

The Court delivered the following

JUDGMENT—In this case an interesting question has come up before me whether the endorsee of a railway receipt can, by reason of such endorsement, institute a suit in his own name and recover damages from the Railway on the ground that the goods consigned through the railway had suffered a loss The only point that was argued even before the New Trial Bench was as regards the maintainability of the suit. The New Trial Bench held that the suit was maintainable and affirmed the trial Court's judgment, and granted a decree. As against this judgment and decree of the New Trial Bench this Civil Revision Petition has been filed, and Sri M. M Ismail once again contends before me that the suit filed by the endorsee of the railway receipt in his own name is not maintainable. He has cited before me a Bench decision of our High Court in *Yacob Rowther Sons* v. *Union of India*[1], and also the decision of the Supreme Court in *Union of India* v. *West Punjab Factories*[2] Though he referred me to the ratio in *Morvi Mercantile Bank* v. *Union of India*[3], it does not appear to be relevant for the purposes of this case, as, in the later decision cited by him, the ratio is fully and positively set up by the Supreme Court In *Union of India* v. *West Punjab Factories*[2], the question arose whether a consignee described *eo nomine* as the consignee under the railway receipt had *locus standi* to bring a suit on the mere fact that he held the railway receipt on such endorsement. The following passage from the above decision of the Supreme Court is apposite:

"It is true that a railway receipt is a document of title to goods covered by it but from that alone it does not follow, where the consignor and consignee are different, that the consignee is necessarily the owner of goods and the consignor in such circumstances can never be the owner of the goods The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee will have to be decided on other evidence It is quite possible for the consignor to retain title in the goods himself while the consignment is booked in the name of another person . . As we have said already, ordinarily, the consignor is the person who has contracted with the railway for the carriage of goods and he can sue ; and it is only where title to the goods has passed that the consignee may be able to sue Whether title to goods has passed from the consignor to the consignee will depend upon the facts of each case. ...."

Though the law has been finally settled by the Supreme Court, yet the fact remains that, if the plaintiffs, who are the endorsee of the railway receipt, are able to sustain that there has been a transfer of the title in the goods in their favour, and

* C.R P. No. 474 of 1965 21st December, 1966.

1. I L R. (1965) 1 Mad 248 A I R 1965 Mad. 162
2. (1966) 1 S C J. 350 A I R 1966 S C 395.
3. (1966) 2 S C J 6 (1965) 35 Comp. Cas. 629 A I R 1965 S C 1954.

that they are holding the receipt, which is considered to be a document of title, as the consignee of the goods which the said railway receipt represents, then it appears that they have *locus standi* to institute the action. This is also conceded by Sri M. M. Ismail. In so far as this case is concerned, the plaintiffs have pleaded that they are entitled to the delivery and that they have paid the necessary freight, and, in fact, brought out in evidence that they have advanced large sums of money to the consignor in respect of this consignment. The lower Courts, however, did not address themselves straight on the question whether by reason of such entitlement of delivery, such payment of the freight and such advance of moneys by the plaintiffs to the consignor there has been a transfer of ownership in the goods by the consignor to the plaintiffs. As already stated by me, when once it is established that the plaintiffs, by reason of the endorsement and by positive evidence, have secured the right to ownership in the goods which is the subject-matter of the railway receipt, then they would be entitled to maintain the action. On this particular aspect, no finding has been given by the trial Court In the interests of justice, therefore, I feel that the case has to be remanded to the Small Causes Court for being tried afresh, bearing in mind that the only point which has to be found is whether there has been a transfer of title in the goods to the plaintiffs by the endorsement of the railway receipt in a manner known to law. With this observation the case is remanded to the Small Causes Court. The parties are at liberty to adduce fresh and additional evidence. Cost will abide the result

V.K. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M. NATESAN.

Thatha Gurunadham Chetti .. *Appellant**

v.

Smt. Thatha Navaneethamma (died) and another .. *Respondents.*

Hindu Succession Act (XXX of 1956), *section* 14—*Scope and applicability—If would enlarge an estate acquired with limited interest under an instrument* inter vivos

Section 14 of the Hindu Succession Act, 1956 has to be interpreted as a whole read with the other provisions of the Act The section no doubt enlarges the limited estate taken by a female Hindu in certain cases But sub-section (1) of the section 14 only removes disabilities imposed by the personal law of the Hindus as to the quality or the extent of the estate taken by a female in certain circumstances. It is not the object of the sub-section to put a Hindu female in a better position than a Hindu male. Sub-section (2) of the section makes it clear that where the property is acquired under any instrument, which itself in express terms gives her only a limited or restricted right in the property, it is not the intention of the Legislature to grant full ownership to the Hindu female in such cases. The section is not intended to override lawful terms restricting the rights of a Hindu female in contracts, bargains, bequests or gifts. For sub-section (2) of section 14 to apply it is an essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title to the property If the instrument, be it a decree or award or deed of partition, merely declares the pre-existing title of a Hindu woman to any particular property, the case will be governed by sub-section (1) and not by sub-section (2) of the section A right of maintenance, even if charged over a specified property, does not by itself amount to a transfer of the property but only creates a right of payment over the property. But there may be cases in which discharge of an obligation to maintain out of the family estate, a Hindu woman may be given a specific property. Then she acquires the property although in lieu of her maintenance, under the instrument, if any, which transfers the property to her the source of her title is traceable to the instrument. If such an instrument gives her only a limited interest in the property, the provisions of sub-section (2) of section 14 of the Act will be attracted and the restrictions or limitations validly imposed under the instrument will have full operation notwithstanding that the beneficiary under the instrument is a Hindu female and she takes the estate in lieu of maintenance or arrears of maintenance. If no limitation is provided for in such instrument as to the estate taken in the property then sub-section (1) of section 14 will apply

Appeal against the Decree of the Court of the Principal Subordinate Judge, Chingleput in Appeal Suit No. 41 of 1960, preferred against the Decree of the Court of the District Munsif of Tiruttani in Original Suit No. 1 of 1957.

K. R Krishnaswami Ayyar, K. Sanjeevi Naidu and *K. Kumaraswami,* for Appellant.

S. A. Seshadri Ayyangar and *G. Ramalinga Reddy,* for Respondents.

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*S A. No 1750 of 1961 30th September, 1966.

The Court delivered the following

JUDGMENT.—This Second Appeal involves the question of the applicability of section 14 of the Hindu Succession Act of 1956 to the facts of the case. One Guruviah Chetty died about the year 1932, prior to the Hindu Women's Right to Property Act of 1937 leaving surviving his widow Thatha Muniamma and four sons, Venkatachalam Chetti, Gurunathan Chetti Narasimhulu Chetti, and Bangaru Chetti. The four sons partitioned their family properties in 1946 under the deed of partition Exhibit A-2 dated 11th December, 1946. The family properties were divided into five Schedules 'A' to 'E'. Schedules 'B' to 'E' were taken, one by each son and the 'A' Schedule which contained four items was allotted to the widow of the deceased, their mother, for her maintenance. Under the terms of the allotment, the widow had no powers of alienation of any kind and had only the right to enjoy the income from the properties after meeting the taxes. The four items allotted to the widow for her lifetime were also the subject of division between the four sons, the deed particularising the items respectively to be taken by the sons after her lifetime. Under this provision, the suit property has to go to the share of the son Venkatachalam Chetti on her death. The said Venkatachalam Chetti died issueless in 1954, and the plaintiff in the suit out of which this Second Appeal arises is his widow. The first defendant in the suit is the widow of Guruviah Chetti and mother of Venkatachalam Chetti and his brothers. After the death of her son, Venkatachalam Chetti, by a registered deed, Exhibit B-1 dated 6th December, 1956 she conveyed the suit property which was to go to the share of Venkatachalam Chetti on her death, to her son Gurunadham Chetti, the second defendant, in the suit. It is, in these circumstances, that the widow of Venkatachalam Chetti filed the suit for a declaration of the invalidity of the conveyance of the suit property by the first defendant in favour of the second defendant, contending that the first defendant had no power of alienation of the suit property beyond her lifetime and that the plaintiff as the heir of Venkatachalam Chetti had the vested remainder in the property after the lifetime of the first defendant. It was also pleaded for the plaintiff that the deed of sale was a sham and nominal transaction brought about to defraud the plaintiff of her right in the property. In defence, it was *inter alia* contended that Venkatachalam's interest in the property was contingent on his surviving the widow and that, in any event, the widow's right in the property had become absolute by reason of the Hindu Succession Act of 1956. The first defendant died pending the suit. No one was brought on record as her legal representative, and the defence was continued by the second defendant. All the contentions put forward in defence were overruled and it was further held that the sale deed, Exhibit B-1, was a sham and nominal one. It was pointed out that the first defendant got the suit property only by virtue of the partition deed with restricted rights, and that in the circumstances, there was no enlargement of her estate under the Hindu Succession Act. For the second defendant, who appealed as the sole defendant, the only question mooted in appeal was whether on the date of partition, Exhibit A-2, the properties allotted to the first defendant vested in her the plaintiff's husband having only a contingent interest. As may be expected, in the face of the clear recitals in the deed of partition, the question was answered against the appellant and the learned Counsel for the appellant has not re-agitated before me this aspect of the defence, in my view quite properly.

Mr. K. R. Krishnaswami Ayyar, the learned Counsel appearing for the appellant however strongly contended that the property having been placed in the possession of the widow for maintenance, under section 14 of the Hindu Succession Act, it became her absolute property. Learned Counsel relied on the definition of property given in the *Explanation* to sub-section (1) of section 14. The *Explanation* provides :

"In this sub-section 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person whether a relative or not before at or after her marriage, or by her own skill or exertion or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act."

It was argued that the property in question in this case has been acquired by the widow either at a partition or in lieu of maintenance ; it is therefore 'property' that fell under sub-section (1) of section 14. For the respondent (plaintiff died pending the Second Appeal and her legal representative has come on record), reliance is placed on sub-section (2) of section 14. Sub-section (2) is an exception to sub-section (1) of section 14 and takes out of the application of sub-section (1) property that would fall under sub-section (2). Sub-section (2) runs thus :

> "Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property"

It is contended for the plaintiff that the first defendant acquired the property for the first time only under the instrument of partition and that under the instrument she was given only a restricted estate, a life estate pure and simple and not a woman's estate or what is popularly known as the 'widow's estate' in Hindu Law.

No doubt property given to a female in lieu of maintenance either before or after the Act, becomes her absolute property under sub-section (1). But sub-section (2) has engrafted an exception and while considering sub-section (1), sub-section (2) cannot be overlooked. Where the acquisition by the female of the property is in any of the modes prescribed in sub-section (2) and the acquisition is itself of a restricted estate, such an estate is not enlarged. Sub-section (2) makes it clear that it is not the intention of the Legislature to grant full ownership to a Hindu female who gets the property under a gift, will, or other instrument and the instrument itself in express terms gives her only a limited right or restricted estate in the property. All the clauses of section 14 must be read and interpreted one with the other, with section 14 and with the other provisions of the Act, and thus read, clearly section 14 is not intended to override lawful terms in contracts and bargains or bequests and gifts. Certainly, it is not and it cannot be contended that the object of section 14 is to put a Hindu female in a better position than a Hindu male where the gift or bequest or other instrument as a matter of construction of the document confers only a restricted estate. Section 14 (1) of the Act only removes disabilities imposed by the personal law of the Hindus as to the quality or the extent of the estate taken by the female in certain circumstances, generally found in inherited properties, properties given to her in partition and by interpretation in properties devolving on her without specification of her estate therein. The Act is both an amending and codifying Act and in the definition of property in section 14 of the Act, it will be seen included not only property in which the female Hindu would have a limited estate but also properties which she would hold as full owner even before the Act For sub-section (2) to apply, it is an essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title in the property. If she has an existing right in the property, the interposition of an instrument will not affect the operation of sub-clause (1) on the property. If the instrument, be it a decree or order or award, or deed of partition merely declares the pre-existing title of the Hindu woman to any particular property sub-section (2) would not take the property out of the coverage of sub-section (1). Where a female Hindu takes property under an instrument of the kind specified in sub-section (2) and not by virtue of any antecedent legal right or title in the property, any restriction placed on the property would have its full effect.

Learned Counsel contends that a widow of a deceased coparcener like the first defendant in this case, has a right to be maintained from the family properties and this interest is sufficient for the operation of section 14 of the Act. But the right to be maintained out of family properties by itself does not confer on her any possessory lien or proprietary right or title in the property of the family The widow's right to be maintained out of her husband's property or out of joint family property is an indefinite right which no doubt can be made certain and charged on specific properties by agreement, decree of Court or panchayat award or otherwise. Section 39 of the Transfer of Property Act provides for the enforcement of the right of maintenance from the profits of immovable property even against a transferee of the property

if he has notice thereof or where the transfer is gratuitous, but it is manifest that neither section 39 of the Transfer of Property Act nor the personal law makes the bare right of maintenance out of the profits of a property a proprietary right in the property. Even when a charge is created over a specified property it is well known there is no transfer of the property or of any right in the property, only there is creation of a right of payment out of the property In the discharge of the obligation to maintain out of the estate of the husband or of the property of the family, particular property may be transferred to the female and placed in her possession. Then, no doubt she acquires the property in lieu of maintenance, but the instrument where there is one which transfers the property to her is then the source of her title to the property. She acquires the property only under the instrument, true in lieu of her right to maintenance. If there are no restrictions on the estate thus carved out or no limitation on the property thus provided for maintenance in the instrument, then sub-section (1) of section 14 can apply. But if the instrument gives only a restricted estate, sub-section (2) is attracted As to the validity of the restrictions imposed under the instrument, one must look to the Transfer of Property Act, the Succession Act or other laws governing transfer of interest in the property. But restrictions validly imposed by the instrument will have full operation now notwithstanding that the beneficiary under the instrument is a Hindu female and she takes the estate, may be in lieu of maintenance or for arrears of maintenance.

Learned Counsel for the appellant sought support for his contention in the decisions; *Sampath Kumari* v. *Lakshmi Ammal*[1], *Sasadhar Chandra* v *Tara Sundari*[2], and *Sharbati Devi* v *Hiralal*[3] In my view, these decisions are of little help to the appellant In *Sampath Kumari* v. *Lakshmi Ammal*[1], the Hindu male died intestate leaving his two widows and two daughters and the instrument which was relied upon as restricting the right of the widows under section 14 (2) of the Act was the deed of partition between the two widows The learned Judge, Venkataraman, J., who delivered the leading judgment of the Bench in the case besides observing that the deed there in question did not in any way restrict the ordinary Hindu widow's estate which each of the widows would otherwise have had in the properties on the date of the partition, observed at page 855.

" Secondly, we are also in agreement with the learned Subordinate Judge that it cannot be said that the widows acquired the right to the properties only under the partition deed, for the simple reason, that they had acquired the right even previously by inheritance as widows of their husband and the partition merely divided the properties allotting some to the first defendant and the rest to the fourth defendant "

The case *Sasadhar Chandra* v. *Tara Sundari* [2], is also similar. It is pointed out that a property is said to be " acquired " under section 14 (2) when prior to the acquisition the person who acquired it had no interest in the property It is observed at page 440 :

" If prior to the date of the decree it was a case of allotment of property to a female Hindu under a pre-Act partition decree the Hindu female had title and all that the decree does is to declare the title of the female Hindu in the said properties, the female Hindu cannot be said to have acquired the property under the decree Her right is merely declared Such a declaration of a pre-existing right in a property cannot be said to be an acquisition of property by a female Hindu The preliminary decree in a partition suit does nothing more than declare the existing rights of the parties In the case of a female Hindu the declaration must necessarily be to the effect that she would have restricted estate of a Hindu female It cannot be said that by such a declaration in the preliminary decree the Hindu female acquires a share in the joint family property Nor does the direction in the preliminary decree to allot to her property to be held by her in severalty in lieu of her undivided share in the joint estate amount to acquisition of new property by her The preliminary decree in a partition suit cannot therefore be said to be a decree within the meaning of sub-section (2) of section 14 "

In *Sharbati Devi* v. *Hiralal*[3], a case from Punjab the properties were mutated half and half between the widow and her husband's brother. In a subsequent suit between the two there was a compromise decree and it was claimed that subsequent to the Hindu Succession Act of 1956 the property having been taken by the widow in

1 (1962) 2 M L J 464 75 M L.W 639 I.L.R. (1962) Mad. 832.

2 A I R. 1962 Cal 438

3 A I R 1964 Punj 114.

lieu of maintenance, she became the full owner of the same under section 14 (1) of the Act. Upholding the claim, it was observed at page 116:

"It is admitted that by means of the compromise on which the consent decree was passed in 1951 she did not get any larger interest or was not put in possession of more properties or share in the properties than what was in the possession already by virtue of the mutation dated 31st December, 1938 . . In this view of the matter it cannot be said that it was by virtue of the decree that the appellant came to be in possession of the suit property"

It should be noticed that when the properties were mutated half and half and the widow was put in possession of a part of the estate in lieu of maintenance no restrictions were specifically imposed on her interest in the property. On the other hand reference may be made to the decision in *Mt. Sampato Kuer* v. *Dulhin Mukha Debi*[1]. In that case a widow who came into possession of her husband's property gifted all of them to her daughters in 1947 and the daughters in return executed a deed of maintenance in her favour providing by the deed that she would have possession of the properties for her lifetime only with a right to enjoy the income from the property in lieu of maintenance. She was conferred no powers of alienation. The learned Judges. Ramaswami, C.J. as he then was and Kanhaiya Singh, J., held that the widow's interest in the case was only a restricted estate and the case was governed by sub-section (2) and not by the sub-section (1) of section 14 of the Hindu Succession Act.

The first defendant in this case lost her husband prior to the Hindu Women's Right to Property Act, 1937. The only right that she then had under the law was a right to be maintained out of the family properties. She had no title and no right to share in the family properties. The sons could have contented themselves with making a regular money payment and if required charging certain properties for the maintenance amount. But when they partitioned, the estate amongst themselves, they set apart property giving her a life estate pure and simple in the property, the property to revert to the sons on her death. The estate given to the widow for her maintenance was restricted to a life estate. She was not granted any powers of alienation. Her right was limited to the enjoyment of the income from the property. What she got under the partition was not the qualified estate of a Hindu female known as woman's estate or widow's estate. She was not even a party to the partition deed as partition could be had only between persons having pre-existing proprietary rights in the property. It follows that the estate given to the widow under the instrument of partition fell under section 14 (2) of the Act, and that section 14 (1) did not operate or the estate and make the widow a full owner. In the circumstances, any alienation by the widow cannot enure beyond her lifetime.

The Seocnd Appeal therefore fails and is dismissed and in the circumstance there will be no order as to costs.

No leave.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

R. Sundararajulu Naidu, represented by Power Agent J. D. Fernandez .. *Petitioner**

v.

Entertainment Tax Officer, Madurai VII .. *Respondent.*

Madras Entertainment Tax Act (X of 1939), section 7-A—Weekly returns submitted accepted tax levied and collected—Materials found on a surprise inspection—Best Judgment assessment on the basis for the period—No power—No provision also in the Act for assessing escaped income.

In a case where the petitioner submitted weekly returns as required by the Rules (under the Madras Entertainment Tax Act) and his returns were accepted, tax levied and collected, the Depart-

1. A I R 1960 Pat. 360

* W. P. No. 513 of 1963. 11 Octobe 1966.

ment cannot, even on the basis of materials obtained on a surprise inspection, assess him on the best judgment basis for the relevant period If the Department is not satisfied with the returns submitted, on the ground that they are incorrect or incomplete, the Department should make an enquiry under section 4 or 4-A of the Act.

The Act does not contain provision for assessment of escapement The well-known principle that the assessee can avoid tax and not evade tax will be applicable

Petition under Article 226 of the Constitution of India.

K. Srinivasan for *P Ananthakrishnan Nair* and *T S. Sankaran*, for Petitioner.

The Assistant Government Pleader, for Respondent.

The Court made the following

ORDER —This petition has been filed to quash the order dated 20th April, 1963, of the Entertainment Tax Officer, Madurai VII, calling upon the petitioner to pay a further sum of Rs 21,539-32 being the balance of tax due and payable by the petitioner in respect of the period from 30th April, 1961 to 24th September, 1962

The petitioner is the lessee of the Imperial Cinema, Madurai He is the holder of a permit in Form IV, issued under rule 21 of the Madras Entertainment Tax Rules He was filing returns as required by the provisions of the Madras Entertainment Act, 1939. The returns were accepted, taxes levied and also collected from him by the departmental authorities While so, during a surprise inspection of the theatre at 10-40 P M on 25th September, 1962, the departmental officers seized records such as pocket notebooks, note-books, diary etc. from the theatre premises. The Officer found from these records that the petitioner had suppressed the true income by sale of tickets during the relevant period. Accordingly, the Officer concerned issued notice calling upon the petitioner to explain the various irregularities, as found in the records seized from him. The petitioner submitted his explanation. The Department accepted his explanation in regard to some of the items, and finally concluded that a sum of Rs. 21,529-32 was still due from the petitioner, and accordingly issued the notice of assessment and demand dated 30th April, 1963, calling upon the petitioner to pay the said amount within 21 days from the date of service of the notice and also intimating the petitioner that failing which the amount would be recovered as provided in section 14 of the Act In these circumstances, the petitioner has rushed to this Court praying for the issue of a writ of *certiorari* to call for the records and quash the order dated 30th April, 1963.

In this writ petition, the petitioner has submitted that he is not to be assessed to entertainment tax on the basis of the whole gross collections, that the Rules do not provide for the normal safeguards for the protection of the records seized by the Officers, and that the Department having accepted the returns submitted by him and levied tax and also collected them, there is no scope for proceeding to make the assessment on best judgment basis.

The contention of the Department is that the petitioner ought to have availed himself of the remedy by way of appeal as provided in the Act, that the petitioner did not keep true and proper accounts during the relevant period but was keeping secret accounts which were unearthed at the time of the inspection and that though returns were submitted they were neither correct nor complete and as such the provisions of rule 26-A (best judgment assessment) are clearly attracted to the facts of the case.

For a proper disposal of this writ petition, it is necessary for me to trace the history in detail of this entertainment tax which has come into existence in the State from 1927 For the first time, the Madras Local Authorities Entertainment Tax Act (V of 1927), was passed, and the charging section, section 5, provided that the entertainment tax shall be charged in respect of each person admitted for payment, and, in case of admission by stamped ticket shall be paid by means of stamp on the ticket and in the case of admissions otherwise than by stamped ticket shall be calculated and paid on the number of admissions This Act was repealed by the Madras Entertainments Tax Act, 1939 (X of 1939) It provided for levy of entertainment tax in respect of each person admitted on payment and should be calculated and paid on the number of admissions. The Rules framed under the Act provided

for the keeping of true and correct accounts and submission of returns in the manner specified in the permit in Form IV In the year 1952, the Amending Act V of 1952 was passed Section 7-A introduced by the Amending Act provided, for the first time, for the submission of returns relating to payments for admission, to such authority, in such manner and within such periods as may be prescribed The return should be in Form II and should contain the price of admission, serial number of tickets issued, number of tickets sold, number of free passes issued, amount received on account of tickets sold and the amount of entertainment tax If the prescribed authority is satisfied that any returns submitted is correct and completed, it shall assess the proprietor on the basis thereof Section 7-A (3) provides that if no return is submitted by the proprietor of the entertainment or if the return submitted by him appears to be incorrect or incomplete, the prescribed authority shall, after making such inquiry as it considers it necessary, determine the tax due under section 4 or 4-A or under both the sections and assess the proprietor to the best of its judgment Rule 26-A is to the similar effect Clause (4) of Form IV mentioned in rule 26-A says that a return giving the totals in respect of the particulars in Form II appended to the Madras Entertainments Tax Rules, 1939, for all performances during the week from Monday to Sunday (both days inclusive) shall be sent so as to reach the office of the Entertainments Tax Officer on the Tuesday immediately following at the latest. This in brief is the history of the legislation relating to entertainments tax.

It is common case for both the petitioner and the respondent-officer that during the relevant period, the petitioner submitted returns as per the Rules His returns were accepted, tax levied and also collected by the authorities from the petitioner herein As stated already, if the authorities are not satisfied with the returns submitted, on the ground that they are incorrect or incomplete, then they should make an enquiry and determine the tax due under section 4 or 4-A of the Act, to the best of his judgment. I fail to see how the officers, after accepting the returns, levying the tax and collecting it, can say that the returns submitted to them are incorrect and incomplete. The Officers, in such a case as the present one, cannot resort to the procedure of best judgment.

The only other provision or procedure that can be adopted is to assess the petitioner on the basis of escaped turnover or income. That will give rise to the question as to whether there is any provision in this statute to assess the petitioner for escaped income or turnover. "Escaped income" in the taxing statute is a phrase familiar to the taxing authorities, well-conversant with legal draftsman, and very notorious with the assessees on account of the dubious methods adopted by them in the suppression of real income Other taxation laws provide for assessment of escaped income or turnover For instance section 19 of the Madras General Sales Tax Act of 1939, and rule 17 of the Rules made under that Act provide for assessment of any turnover which has escaped assessment Section 16 of the Madras General Sales Tax Act of 1959 deals with escaped assessment Similarly section 35 of the Madras Agricultural Income-tax Act provides for escaped assessment Again the Indian Income-tax Act, by section 34 of the 1922 Act and section 147 of the 1961 Act provides for income escaping assessment Thus, in all these statutes there is provision for assessment or re-assessment as the case may be But curiously, ever since the Entertainments Act has been enacted, there is no provision made for assessment of escaped income or turnover with the result a person like the present petitioner can escape paying the amount of tax legally due and payable by him The petitioner will be following the well-known principle in the taxing statute, *viz*, that an assessee can avoid the tax but not evade the tax.

In *Kamalammal* v *Board of Revenue*[1], weekly returns were filed under section 7-A of the Madras Entertainments Tax Act All of them were accumulated and a consolidated single assessment was made on the best of judgment basis, on the ground that certain defects were noticed at an inspection and there was material that some of the returns were defective. Srinivasan, J held that the procedure adopted was illegal, and that section 7-A and the Rules would go to show that each return was

1. (1964) 1 M.L.J. 394 : 77 L.W. 343.

independent of the rest and had to be assessed separately from the rest In this case weekly returns were filed, accepted, tax levied and also collected from the petitioner. When such is the case, the petitioner cannot be called all of a sudden, may be after inspection, to pay accumulated tax, on the materials alleged to have been unearthed during a search of the premises Unless the statute is amended, the taxing authorities will have no jurisdiction to call upon the petitioner to pay tax on escaped income or escaped turnover

The result is the petitioner succeeds and the rule is made absolute There will, however, be no order as to costs

K. S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M. NATESAN.

Ameer Bibi .. *Appellant**

v.

Chinnammal *alias* Nagoorammal and another .. *Respondents.*

Adverse possession—Co-owners—Ouster—Proof of—Notice of hostile title being set up—What constitutes—Registration as constructive notice—If sufficient

Transfer of Property Act (*IV of* 1882), *section* 3—Explanation I—*Notice under—Scope of—Registration of a document by one tenant in common—If would impute knowledge to other co-tenants*

Limitation Act (*IX of* 1908), Article 144—*Adverse possession or ouster—Notice of mere registration—if amounts to notice—Doctrine of constructive notice—If imported*

The equitable doctrine of constructive notice as laid down in *Explanation* I to section 3 of the Transfer of Property Act cannot be imported into the provisions of the Limitation Act. Even under the *Explanation* registration as such is made notice only to transferees subsequent to the registration. Hence the creation and registration of a simple mortgage deed by a tenant-in-common over the joint property cannot by itself be deemed to be a notice to the other tenants-in-common as such persons are not subsequent transferees To make mere registration of any transaction by a tenant-in-common itself notice to the other co-owners is to impose on tenants-in-common a duty to be on the watch and make frequent search of registration records lest their rights get barred by silent acts and deeds of one of them

In cases of co-owners there is unity of possession *i e*, possession of one of the co-owners is possession of all of them and in order that possession of anyone becomes adverse against others there must be something more than mere exclusive possession or occupation by such a person. The nature of possession by one co-owner to become adverse and bar the rights of the other co-owners must be such that one can infer from it an intention by such person in possession to keep out the others in assertion of an exclusive and hostile title in himself to the property A silent possession by a co-tenant accompanied by no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not to be construed as adverse possession. But the ouster of the other co-tenant need not be a violent or intimidating expulsion of the others Acts of adverse possession by a co-tenant in occupation, if sufficiently overt and the attendant circumstances warrant an inference that adverse rights are being asserted such acts would constitute ouster The acts that might constitute adverse possession as between strangers, do not necessarily have such effect as between co-owner or tenants-in-common.

(Principles explained—Case-law reviewed)

Appeal and Memorandum of Objections against the Decree of the District Court of Madurai in Appeal Suit No 151 of 1961 preferred against the Decree of the Court of the District Munsif of Melur in Original Suit No 220 of 1960, and

C.M P No. 11818 *of* 1966 —Petition praying that for the reasons stated therein, the High Court will be pleaded to permit the petitioner herein (Respondents in S A) to raise the following additional grounds in the memorandum of cross-objections namely " on the admission of the plaintiff as P.W 1, that the first defendant was in exclusive possession of the suit house ever since the sale under Exhibit A-2, the learned Judge ought to have in any event held that the first defendant has perfected title to suit item No. 1 by adverse possession ".

N K Ramaswamy and *S Sundaram Iyer*, for Appellant.

K Sarvabhuman and *T R Mani*, for Respondent.

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*S A No 1650 of 1962 and Memo of objections and C.M.P. No. 11818 of 1966. 20th September, 1966.

The Court delivered the following

JUDGMENT.—The parties to this litigation are a Muslim mother and her two daughters. The eldest of the two daughters is the plaintiff, the mother is the first defendant and the other daughter figures as the second defendant In 1928 the first defendant for herself and as guardian of her then minor daughters instituted a suit, O.S. No. 148 of 1928 on the file of the District Munsif's Court, Madurai Town, for partition of their shares in certain properties and secured under the decree in the said suit for herself and her daughters the southern portion of a house and 3.34 acres of nanja land. There have been some alienations of the properties thus obtained. The present suit has been instituted by the elder daughter for partition and separate possession of the remaining properties, the house described as item 1 in the plaint schedule and an extent of 1-20 acres of land described as item 2 in the plaint schedule. The shares of the parties are 16/39 each for the plaintiff and the second defendant and 7/39 for the mother, the first defendant. The plaintiff claims the mother's share in item 1 under a sale deed Exhibit A-2 dated 2nd April, 1942. The plaintiff therefore prays for partition and separate possession of 16/39th share in item 2 and 23/39th share in the house, item 1. In defence it is pleaded that there was an oral partition between the parties in or about 1931 wherein the house, item 1, was wholly allotted to the share of the mother, the lands being taken by the plaintiff and the second defendant for their share. It is stated that the plaintiff had parted with her share of the land, and that she had absolutely no right or interest in the suit properties which belonged to the defendants in titles as aforestated. Exclusive and adverse possession for over 30 years of the house by the first defendant and the suit land by the second defendant is set up The sale of a portion of the house by the first defendant in favour of the plaintiff, it is stated, is a sham transaction not entitled to pass title. The trial Court upheld the defendant's case of partition in 1931 and their exclusive possession of the suit properties for over the statutory period and non-suited the plaintiff.

On appeal by the plaintiff the learned District Judge has rejected the plea of an oral partition in 1931 put forward by the defendants. On this finding as it followed that the parties were co-owners, the learned District Judge examined the question whether there was ouster of the plaintiff with reference to the suit properties. With reference to the suit property, item 1 of the plaint schedule, it was noticed that apart from the facts that the house stood registered in the name of the first defendant in the Municipal Registry, that she paid the house tax and that she continued in occupation of the property, there was nothing to establish ouster or adverse possession of the co-owner. It was therefore held that the plaintiff would be entitled to partition and separate possession of her 23/39 share in the house. The sale by the mother under Exhibit A-2 was held as conveying to the plaintiff only the mother's share in the house. Even the trial Court was inclined to accept the reality of the sale deed, but found against the plaintiff holding that the first defendant had exclusive possession of the house for over the statutory period, the house besides having fallen to the share of the first defendant in the oral partition. Coming to the second item, while of the view that the mere fact that the kist for the second item had throughout been paid by the second defendant would not deprive the plaintiff of her rights therein, the learned District Judge thinks that the execution of a duly registered simple mortgage in 1947 by the second defendant in favour of the Co-operative Society of Arumbanur brought about ouster. The learned District Judge is perfectly conscious that there has been no transfer of possession as in *Palani Pillai* v *Ibrahim Rowther*[1] The learned District Judge is aware that one of the requirements for ouster to be effective is notice of the hostile intent in the co-tenant in occupation brought home to the co-tenant not in occupation. But then applying the definition of 'notice' in *Explanation* I to section 3 of the Transfer of Property Act and holding that registration of the deed of mortgage was notice of the hostile intent, the plaintiff's rights in item 2 are held barred by adverse

1. I.L.R. (1943) Mad. 15: (1942) 2 M.L.J. 321: A.I.R. 1942 Mad. 622 (F.B.).

possession. The plaintiff in the Second Appeal challenges this view of the learned District Judge. A memorandum of cross-examinations has been preferred by the first defendant in respect of item 1.

The question whether on facts found there is ouster or not is a question of law on which a Second Appeal could lie. As regards the second item, the land as aforestated the only ground on which the plaintiff has been non-suited is the mortgage transaction evidenced by Exhibit B-17 in the case dated 13th March, 1947. This mortgage is certainly over 12 years before the suit, the plaint having been presented on 3rd August, 1960. No other hostile act can be relied upon The patta for the land had continued in the name of the mother. No doubt the second defendant alone has been paying kist for the land and enjoying the profits therefrom. Properly the learned District Judge has not rested his decision on the payment of kist and the enjoyment of the income by the second defendant as amounting to ouster of the plaintiff. The parties are tenants-in-common It has to be taken as established beyond challenge in Second Appeal, that the second defendant has been in exclusive occupation of the land and enjoying the profits therefrom. The question is whether this coupled with the execution of the simple mortgage in 1947 whereby the second defendant raised loans for herself on the security of the second item, amounts to adverse possession and hostile enjoyment. The execution of the simple mortgage is a solitary act of assertion of exclusive title. There is no evidence that the execution of the mortgage and the title asserted therein was otherwise brought home to the knowledge of the plaintiff. The learned District Judge relies only on the doctrine of constructive notice in *Explanatian I* to section 3 of the Transfer of Property Act. It is not, as it cannot be, seriously contended before me, that one must import this equitable doctrine of constructive notice into the provisions of the Limitation Act. The Indian Registration Act itself does not make registration notice for all purposes, when specifying the effects of registration and non-registration. In *Tilakdharilal* v. *Khedan Lal*[1], Lord Buckmaster observed:

" That notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian Register of deeds "

Even under *Explanation I* to section 3 of the Transfer of Property Act registration is made notice only to transferees subsequent to the registration Registration of a subsequent transaction is not notice of the transaction to prior transferees. How in the circumstances, the registration of a deed of a simple mortgage by the second defendant, would amount of notice of the mortgage to the plaintiff who is not a subsequent transferee, I am unable to comprehend. To make mere registration of any transaction by a tenant-in-common itself notice to the other tenants-in-common of the transaction is to impose on tenants-in-common a duty to be on the watch and make frequent search of registration records, lest their rights get barred by overt acts and deeds of one of themselves. The article of limitation applicable among co-tenants is the residuary Article 144 of the Limitation Act of 1908. The starting point of limitation is when possession becomes adverse. Possession is generally adverse, it is the indicia of title. But where the parties are co-owners there is unity of possession, possession of a co-owner is possession of all the co-owners and for possession to become adverse, there must be something more than mere exclusive occupation by one of the co-owners. This exclusive occupation by one of the co-owners, with added features which would amount to adverse possession is termed ouster. The character of possession that would bar a co-owner must be such that one can infer from it an intention by the co-owner in occupation to keep out the other co-owners in assertion of exclusive and hostile title in himself to the property.

The law as to what amounts to adverse possession or ouster between co-owners is now well settled. In *Jogendra Nath Roy* v. *Baldeo Das*[2], the position is thus stated:

" The fundamental rule is that the entry and possession of land, under the common title of one-co-owner, will not be presumed to be adverse to the others, but will ordinarily be held to be for the

1. (1920) 39 M L J. 243 · I L R 48 Cal 1 at at 20.

2. I.L.R. 35 Cal 961 at 968 and 969.

benefit of all The obvious reason for this rule is that the possession of one co-owner is in itself rightful and does not imply hostility as would the possession of a mere stranger To use the language of Mr Justice Story in *Reward* v *William*[1] " the law will never construe a possession tortious unless from necessity, on the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful, and thus upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears " a co-tenant will not be permitted to claim the protection of the statute of limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him, it must further be established that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant-in-common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and *disseisin* are intended to be asserted, in other words, in the language of Chief Justice Marshall in *Mcclung* v *Ross*[2], a silent possession accompanied with no act, which can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not to be construed into an adverse possession "

In *Krishnayya* v. *Udayalakshmama*[3], Venkatarama Ayyar, J., (as then was of this Court) observed :

" If the law is and that is not and cannot be disputed—that there is ouster only when the assertion of a hostile title is made to the knowledge of the co-owner, then any secret and unpublished hostile intention of the co-tenant in possession cannot amount to ouster and cannot avail to start limitation against his co-tenant."

Reference also may be made to the observations in *Jagannath Marwari* v. *Sm. Chandni Bivi.*[4]

" In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants' knowledge of the denial of their rights The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants But the ouster of the other co-tenants, in order to render the possession adverse, need not be violent, or intimidating expulsion, or repulsion "

All the authorities make one thing clear, that the acts that might constitute acts of adverse possession as between strangers do not necessarily have such effect as between tenants-in-common, as their acts of assertion of ownership may be capable of being explained as consistent with the joint title However a tenant-in-common cannot close his eyes and ears and ignore overt acts of hostile possession and plead absence of knowledge of such acts. If the acts of adverse possession by a co-tenant in occupation are sufficiently overt and the attendant circumstances warrant that a reasonable, prudent and attentive man cannot but infer that adverse rights are being asserted against him, the acts would be ouster. While there is no actual notice of the denial of title of the co-tenant not in occupation, the tenant in occupation must make his possession visibly hostile, notoriously and ostensibly exclusive and adverse to impute knowledge of the hostile possession to the co-tenants sought to be ousted In *Peeran Sahib* v *Jamaludin Sahib*[5], Subba Rao, C. J. (as he then was of the Andhra Pradesh High Court) observed :

" A co-owner who pleads ouster must establish that there was a denial of the other co-owner's right to his knowledge and that he continued to enjoy the property exclusively for the statutory period after such unambiguous denial Ouster in suitable cases can be presumed from non-participation in the profits of the land for a long period of time affecting different generations under such circumstances that denial could not be proved but could only be inferred "

Again in *P Lakshmi Reddi* v. *L Lakshmi Reddi*[6], the principle is enunciated thus :

" But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out . The co-heir in possession cannot render his possession adverse

1. 7 Wheaton 107.
2. 5 Wheaton 116
3. (1953)2 M L J 241 at 246
4. 26 C.W N. 65 at 71 and 72.
5. I L R 1957 A P 245 (1957) 2 An W R 71 A I R 1958 A P 48 at 53.
6. (1957) S C J 248 : A I R 1957 S C. 314 at 318.

to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heirs' title "

In the light of the above principles it is clear that there can be no inference of ouster with reference to the second item even. The execution of a simple mortgage over the property does not by itself bring about a change in the character of the possession of the property at any rate there is no overt or visible change in the occupation of the property to amount to notice of hostile intent to hold the property as sole owner The mere assertion of sole ownership in a deed of mortgage cannot therefore without something more tangible be taken as commencement of ouster. It may be different if the acts and circumstances attendant on the execution of even a simple mortgage clearly show, that without any effort at concealment the intention of the co-owner in occupation, is to exclude the other co-owners from the property and the acts of exclusive possession are animated by a desire to invade the rights of other co-owners Even when other co-owners are in actual occupation, one co-owner may execute a simple mortgage of the entire property without their knowledge and a co-owner not in occupation may also mortgage the common property as exclusively belonging to him We are here not concerned with what plea a mortgagee in such circumstances may put forward. I am only pointing out that the execution of a simple mortgage by one co-owner does not by itself bring about *disseisin* or dispossession of the others In a non-possessory simple mortgage there is no visible evidence of hostility. Nor is there necessarily any incompatibility with the subsistence of the possessory rights of other co-owners in the property.

The isolated act of execution of the simple mortgage by the second defendant in this case cannot therefore bring about ouster from the property of the other co-owners No doubt the mortgage has been kept alive. But in the circumstances of the case it can make no difference. In *Krishnayya* v *Udayalakshmamma*[1], the exclusive possession and enjoyment was about 18 years and there was no participation by the other co-owners in the profits during the entire period. Yet it was held that the defendants had failed to establish ouster.

In the memorandum of cross-objections the defendants challenge the finding of the lower appellate Court on the question of partition But there was material before the Court for the inference that there was no partition The transactions relied upon for the defendants in support of the plea of oral partition are consistent with the continuance of the tenancy-in-common. Learned Counsel for the defendants next contended that the Courts below erred in applying the principle of ouster as regards item 1. No specific ground has been taken in the memorandum of cross-objection; but leave of Court was sought to raise the ground and a petition has been presented for the said purpose The argument now put forward may be summed up thus . The Courts below find that the first defendant had been in exclusive occupation of the house for nearly 30 years. The lower appellate Court in the absence of any hostile act would hold that there has been no ouster But it has lost sight of the fact that the first defendant has under Exhibit A-2 dated 2nd April, 1942 conveyed the house to the plaintiff for consideration The first defendant's plea that the sale was a nominal and sham transaction has been found against by both the Courts below and the plaintiff's case of sale for consideration has been accepted The learned District Judge has in the light of the other evidence and the circumstances of the case inferred that what was conveyed by the first defendant to the plaintiff under Exhibit A-2 was the share of the first defendant in item 1 Once the reality of the sale is upheld, the first defendant has ceased to be a co-owner Her possession of the entirety of the house thereafter ceased to be as a tenant-in-common She had no right to be in possession thereafter of any part of the house having lost all her interest therein and from the moment of sale her exclusive possession would be adverse to her erstwhile tenants-in-common The special considerations applied when determining whether there has been adverse possession or not as between tenants-in-common, is no longer applicable to the exclusive possession of the first

1. (1953) 2 M.L.J. 241 at 246.

defendant. While the argument standing by itself is sound, it overlooks the evidence on behalf of the plaintiff that after the sale the mother was permitted to continue to live in the house till her death. The plaintiff has further stated that she used to go and live with her mother in the suit house occasionally though the house was in her mother's sole occupation, till illfeelings arose between her and her mother about an year prior to the suit. The learned District Judge accepts this evidence, as he observes that the first defendant had been allowed to be in possession of the house. The entire case of the defendants rested on the plea of partition and separate possession thereunder and as regards Exhibit A-2 it has never been the case of the first defendant that notwithstanding the sale she intended to remain in possession hostile to the claim of the plaintiff thereunder. Her own case was that it is a sham and nominal transaction. The requisite *animus* to possess against the rights created under the sale deed is even admittedly wanting. In the circumstances, this defence in respect of item 1 falls to the ground.

The Second Appeal succeeds There will be a preliminary decree for partition of the second item in the plaint also, the plaintiff's share therein being 16/39 The memorandum of cross-objections fails and is dismissed. In the circumstances of the case the parties will bear their respective costs. No leave.

C M.P. No. 11818 of 1966 —No order necessary.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P RAMAKRISHNAN.

P. Kannamba (deceased) and others . *Petitioners**

v.

The Board of Revenue (C T), Madras, represented by the Commissioner of Commercial Taxes, and another . *Respondents.*

Madras General Sales Tax Act (I of 1959), sections 24, 27 and 29—Arrears of sales tax due by assessee—If could be recovered from the properties of the assessee in the hands of alienees for valuable consideration—Scope of.

Madras General Sales Tax Act (I of 1959), section 24 and Transfer of Property Act, section 100—Relative effect.

Madras Revenue Recovery Act (II of 1864) and Act (VI of 1867), sections 3 and 26—Recovery of arrears of land revenue and recovery of arrears of sales tax as if they were arrears of land revenue—Difference in scope

The provisions of sections 24, 27 and 29 of the Madras General Sales Tax Act read with the provisions of the Madras Revenue Recovery Act, cannot enable the Revenue Authorities to recover any arrears of sales tax due by an assessee from the properties which has ceased to be his properties. The property in the hands of successive transferees from the assessee cannot be made liable for the realisation of the amount due by the assessee in respect of his business Cases of transferees of the business of the assessee governed by section 27 of the Act stand on a different footing by virtue of the extended meaning given to the term 'defaulter' Such an extended meaning cannot be availed of to make the transferee of the defaulter's immovable properties liable for the arrears of tax, though such properties may be liable for the arrears of tax due by the assessee if they continued to be the property of the assessee at the time of the attachment and recovery proceedings.

Quaere —Does the charge created by section 24 of the Sales Tax Act enure as against transferees for valuable consideration and can such a transferee invoke the aid of section 100 of the Transfer of Property Act ? Can such a property be proceeded against by other methods such as by a suit to enforce the charge created by the statute ?

Under section 3 of the Revenue Recovery Act any arrears of land revenue due by a defaulter in respect of any particular piece of land can be recovered from the transferee of the land, since the transferee, as the owner of the land, will be liable to pay the arrears of land revenue as he must be considered to be a defaulter in the same way as the original owner was at the time when the land belonged to him But this provision, which specifically relates to arrears of land revenue due in respect of particular property, cannot apply to cases of recovery of sales tax due by an assessee. Section 26 of the Revenue Recovery Act will not enable the Collector to attach the property of the assessee when they have ceased to be his property at the time when the attachment is sought to be effected There is no provision in the Revenue Recovery Act or under the Sales Tax Act under which an alienee of the property of an assessee could be construed as a defaulter in respect of the sales tax arrears due by the assessee

*W.P. No. 497 of 1964. 8th November, 1966.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in B P. Rt. No. 638 of 1964 on the file of the Board of Revenue (C.T.), Madras-5 and quashing the order dated 14th February, 1964, made therein by the Commissioner of Commercial Taxes, Madras.

R. Gopalaswamy Iyengar, for Petitioners 2 to 4.

The Government Pleader, for Respondents.

The Court made the following

ORDER.—The first petitioner, Smt Kannamba, died in the course of the pendency of this writ petition, and petitioners 2 to 4 have been impleaded as her legal representatives. Their prayer in the writ petition is for the issue of a writ of *certiorari* under Article 226 of the Constitution, quashing an order dated 14th February, 1964 passed by the Commissioner of Commercial Taxes, Madras. The prior facts necessary for a consideration of this writ petition are briefly the following

Premises No. 10-A, Dandayuthapani Street, Madras-17 belonged formerly to one Ranganatham Chetty who sold it on 18th April, 1958 to one Ramaswami, and from Ramaswami the first petitioner purchased it on 11th May, 1961. This Ranganatham Chetty had some business as a dealer both in Madras City and at Tindivanam in South Arcot, and there were arrears of sales tax due by him, for an amount of Rs. 6,750 and odd, for the years 1954-55 to 1956-57. On the ground that Ranganatham Chetty did not have sufficient means to pay the sales tax, the aforesaid house property was proposed to be attached and sold under the provisions of the Madras Revenue Recovery Act, Madras Act II of 1864. For this purpose the Special Assistant Commercial Tax Officer for Sales Tax Collections, South Madras, the second respondent, sent a notice on 11th March, 1963, to the first petitioner, calling upon her to pay the arrears within seven days from date of receipt, and a notice of attachment under the Revenue Recovery Act was also sent along with the notice. The first petitioner tried to obtain relief against these proceedings, by approaching the authorities of the Commercial Tax Department. But they did not give her any relief, and the first rexpondent, the Commissioner of Commercial Taxes, Board of Revenue, finally dismissed her revision petition on 14th February, 1964.

The first petitioner's brief contention is that she could not be considered as a defaulter in respect of the arrears of sales tax due on account of his business as a dealer, by Ranganatham Chetty, a predecessor-in-title of the suit property, and therefore it is illegal to make her property liable under the Revenue Recovery Act, Madras Act II of 1864, for the arrears of sales tax due by Ranganatham Chetty.

The first respondent, the Commissioner of Commercial Taxes in his counter-affidavit, stated that the arrears of sales tax due by Ranganatham Chetty referred partly to his business at Tindivanam in the South Arcot District, and partly to his business in Madras City. According to the affidavit, under section 10 of the Madras General Sales Tax Act, 1939 and section 24 of the 1959 Act, if the arrears of sales tax are not paid within the due dates specified in the demand notice, the whole of the amount outstanding on the date of default, shall become immediately due, and it shall be a charge on the properties of the defaulter In view of these provisions, the impugned proceedings were quite legal and valid In her affidavit the first petitioner appears to have relied upon the saving clause in section 100 of the Transfer of Property Act which states that no charge whether imposed by operation of law or by act of parties shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge, save as otherwise expressly provided by any law for the time being in force. This claim was also denied by the first respondent in the counter, on the ground that section 100 of the Transfer of Property Act, would not be applicable to the present proceedings.

The arrears of sales tax in the present case, related to a period when the Madras General Sales Tax Act of 1939 was in force That Act was amended in 1959. Section 10 of the earlier Act states that tax assessed under the Act, shall be paid in such manner and in such instalments and within such time as may be specified

in the notice of assessment. If default is made in paying it, according to the notice of assessment, the whole of the amount outstanding on the date of the assessment shall become immediately due, and shall be a charge on the properties of the person or persons liable to pay the tax under that Act. Section 10 (2) provides that any tax assessed or any other amount due under the Act, from a dealer and any fee due from him under the Act, may without prejudice to any other mode of collection, be recovered as if it were an arrear of land revenue. In the later Act of 1959, the corresponding provision is found in section 24. In the Rules framed under the 1939 Act, namely, Madras General Sales Tax Rules, rule 21-A makes the transferee of the business of a dealer, also liable to pay the arrear of sales tax due by the transferor, but the liability of the transferee will be limited to the extent of the value of the business obtained by the transfer. A similar provision is contained in section 29 of the 1959 Act. Now, one point to remember in this connection is that the first petitioner, Kannamba, is not the transferee of the business of Ranganatham Chetty. She is a subsequent transferee of an item of immovable property belonging to him. She could not be viewed as a defaulter so far as the assessment to sales tax is concerned. No doubt section 10 of the Sales Tax Act of 1939 imposes a charge on the property of a dealer for the arrears of sales tax due by him. But here we are not dealing with a case of the enforcement of such a charge. It is only if we are dealing with a case of enforcement of such a charge that it will be necessary to examine the question, whether the first petitioner will be entitled, as a transferee for consideration without notice, of the benefit of the saving clause in section 100 of the Transfer of Property Act.

We have to consider, on the other hand, the scope of Act II of 1864 (or Act VI of 1867 which is the corresponding Act applicable in the City of Madras), and as to how far it can be applied for proceeding against the property of the first petitioner, which she obtained by successive transfers from the sales tax assessee, for the realisation of an amount due by the assessee in respect of his business. We will have to construe the provisions of Act II of 1864 (or the corresponding enactment, Act VI of 1867 applicable in this case) and decide how they can be applied when the Sales Tax Act lays it down that the arrears of sales tax due by the sales tax assessee, will be recoverable as an arrear of land revenue.

Act II of 1864 (Act VI of 1867) in section 26, provides that when the amount due shall not have been paid pursuant to the terms of the demand, the Collector or any other officer empowered by the Collector in that behalf, shall proceed to recover the arrear by the attachment and sale of the defaulter's land. It will be necessary, therefore, to consider the meaning of the word 'defaulter' for the purpose of applying section 26, of Act II of 1864 (Act VI of 1867). At the time of the attachment in the present case, the premises in Dandayuthapani Street had ceased long previously to be the assessee's property. Therefore section 26 will not enable the Collector to attach the first petitioner's property as it had ceased to be the property of Ranganatham Chetty, at the time of the attachment, and there is no other provision in the statute by which the first petitioner could be construed as a defaulter for the sales tax arrears due by Ranganatham Chetty. Rule 21-A of the General Sales Tax Rules framed under the 1939 Act, and section 27 of the 1959 Act, permits the transferee of the business of a dealer, to be considered as a defaulter for the arrears of sales tax due by the transferor in certain contingencies, but such an extended meaning of the term defaulter cannot be availed of, to make the transferee of the defaulter's immovable property, liable for the demand.

The position however is different in the case of an arrear of land revenue due in respect of a piece of land. Section 3 of Act II of 1864 makes every landholder liable to pay to the Collector or other officer empowered to receive it the revenue due upon his land on or before the date on which it falls due. Therefore if for a given piece of land the appropriate revenue had not been paid by the transferor, the transferee as the owner of the land, will be liable to pay the arrears and by reference to section 3 he must be considered to be a defaulter in respect of those arrears, in the same way as the original owner was a defaulter at the time when the

land had belonged to him, before the transfer. It is this interpretation of the provision in section 3 of Act II of 1864, that makes the transferee of a piece of land liable for arrears of land revenue due upon that land, even if the arrears related to a period anterior to the transfer; it gives the right to the Collector to sell the land to recover such arrears of land revenue.

The abovementioned view is based on the decision of this Court in *Subbayyagaru* v. *The Secretary of State for India*[1]. In that case, a village in the Karvetnagar Zamindari was brought by the Collector for sale on 26th May, 1890, for arrears due for a prior period, and at the time of the sale the village had been sold to a different person who was not the owner at the period for which the land revenue was not paid. The learned Judges referred to section 2, (evidently a mistake for section 3) of Act II of 1864 which states that every landholder was bound to pay the revenue due upon his land on the date on which it falls due, and to section 4, which says that when the whole or part of the cist shall not be so paid, the amount or its unpaid portion shall be deemed to be an arrear of revenue. Then they observed that arrear of revenue remains an arrear until it is paid, and the landholder or its registered proprietor is liable to pay it, and when the plaintiff (in the case before them) became the registered proprietor, there were arrears of revenue due on the village and he, as the landholder, became liable to pay it to the Collector and on failure to pay it he became a defaulter They also derived support from section 2 of Act I of 1890, the Revenue Recovery Act (Central), wherein, the word "defaulter" is defined as a person from whom an arrear of land revenue is due. The principle laid down in the above decision cannot be applied to the case of sales tax arrears, because neither the Sales Tax Act nor any other enactment makes the transferee of the land of the assessee, a defaulter in respect of the assessment of sales tax due by the transferor.

In this connection reference may also be made to the Central Revenue Recovery Act (I of 1890). Section 3 of that Act states that where an arrear of land revenue or a sum recoverable as an arrear of land revenue, is payable to a Collector, by a defaulter having property in a District other than that in which the arrear accrued or the sum is payable, the Collector may send to the Collector of that other District a certificate in a form as nearly as may be to the schedule Section 6 of that Act states that when the Collector of a District receives a certificate under the above provision, he may issue a proclamation prohibiting the transfer or charging of any immovable property belonging to the defaulter in the District Under section 6 (3) of that Act, any private alienation of the property or of any interest of the defaulter therein ....made after the issue of the proclamation and before the withdrawal thereof shall be void as against the Government, and any person who may purchase the property at a sale held for the recovery of the amount stated in the certificate In the present case for the arrears of sales tax due for the business of Ranganatham Chetty in Tindivanam in South Arcot District, it is stated before me that the necessary certificate from the authorities in South Arcot was received by the authorities in Madras on 12th March, 1959, but the Madras property in this case belonging to Ranganatham Chetty had been sold by him long prior to that date Therefore by virtue of none of these provisions of law can it be considered that the first petitioner, Kannamba and her legal representatives are defaulters for the sales tax arrears due by Ranganatham Chetty, and therefore their property cannot be proceeded against under the Revenue Recovery Act, for the recovery of the arrears of sales tax due by Ranganatham Chetty.

But whether that property can be proceeded against by other methods, for example, by a suit to enforce the charge mentioned in section 10 of the Act, it is not necessary to decide in the present proceedings, which deal with the limited question of the applicability of the procedure prescribed by Act II of 1864 (Act VI of 1867).

The writ petition is allowed and the rule *nisi* is made absolute. No costs.

R.M. ——— *Petition allowed.*

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1. (1911) 21 M L J 656.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The Coimbatore-Salem Transports (P.), Ltd., Erode . *Petitioner**

v.

The Workmen of Coimbatore-Salem Transports (Private), Ltd., represented by the Tamilnad Motor Workers Union, 3/45, Karungalpalayam, Erode, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10-A—Voluntary reference to arbitration under—Scope of power of arbitrator—Jurisdiction of High Court to interfere under Article 226 of the Constitution with an award on a voluntary reference to arbitration

In a reference under section 10-A of the Industrial Disputes Act for arbitration of disputes it being a voluntary one, by the parties of their own accord, the arbitrator has a wider freedom in adjudicating upon the points and in suitable cases his powers may extend even to an adjudication upon the merits of the punishment awarded and whether it could be mitigated by suitable relief. The strict rule applicable to cases of reference under section 10 by Government that a Labour Court or Tribunal will have no jurisdiction to go into the quantum of punishment, when once it is found that the workman engaged was guilty of acts which warranted the proceedings against him, cannot be applied to cases of voluntary reference under section 10-A where the arbitrator should have a greater discretion.

So long as the power exercised by an arbitrator, even in a voluntary reference under section 10-A of the Industrial Disputes Act, is a quasi-judicial one and his decisions have the effect or validity of affecting the rights of parties *inter se*, the award will be subject to the jurisdiction of the High Court to interfere in suitable cases, under Article 226 of the Constitution.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the award of the 2nd respondent herein dated 14th March, 1964, and published in the *Fort St. George Gazette* Supplement to Part II, section 1, dated 1st April, 1964 at page 2 relating to issue 10 wholly and issue 11 so far as it relates to Sri V N. Narasimhan, Sri P. Sreerangan and Sri Usman and to quash the same.

A. Ramachandran, for Petitioner.

S. Ramasubramaniam, for 1st Respondent.

J. Kanakaraj, for Government Pleader, for 2nd Respondent.

The Court made the following

ORDER.—This is a Writ Petition under Article 226 of the Constitution, directed against the award of the second respondent, Commissioner of Labour, on a reference made under section 10-A of the Industrial Disputes Act, in a dispute that arose between the petitioner herein, the management of a bus transport company at Erode, and the first respondent, certain workmen of the abovesaid company represented by their Union. The dispute in the present case is in regard to four employees by name Kullappan, Narasimhan, Sreerangan and Usman. In the case of Kullappan the points referred to the arbitrator for adjudication were: (1) Is the non-employment of Sri M. Kullappan justified? and (2) To what relief he is entitled? The finding of the arbitrator was that Kullappan while travelling on duty on 26th October, 1960 as bus conductor suffered a severe accident involving fracture in the leg and it led to his hospitalisation. For about one year thereafter, the management was paying wages to Kullappan but thereafter the payment of wages was discontinued. There is however reference to the fact that the Insurance Company was paying him some amounts till November, 1962. Kullappan appears to have written to the management that his disability made him unfit to do the work of a conductor in which post he was employed at the time he sustained the accident, but he might be appointed as a Checking Inspector. But the management replied to him on 4th August, 1962 that the two jobs were

* W.P. No. 629 of 1964. 29th November, 1966.

not dissimilar and that if he was not fit to do work as a conductor, he would be equally unfit to do the work of a Checking Inspector and that they were prepared to give him employment as a booking-clerk at Erode. Thereafter the worker wrote to the management on 10th November, 1962, stating that he had become quite well, that he was prepared to join duty after producing a fitness certificate and that he should be posted as a conductor. The management replied to this letter on 11th November, 1962, stating that he could not be appointed as a conductor or Checking Inspector and that since he was not prepared to accept the post of a booking-clerk, they were rejecting his application for appointment. The management took the view that this correspondence showed that the worker's appointment had been terminated long since and that he was actually applying for re-employment. But the arbitrator accepted the contention of the worker and held that there was no formal order at any time terminating the worker's employment till November, 1962, when the management told him specifically that if he would not accept the job offered as booking-clerk, they would not give him any employment. The arbitrator expressed the opinion that in the above circumstances, where the worker was not willing to accept the post of a booking-clerk offered to him by the management, the termination of his employment by the management in November, 1962, must be deemed to be a valid termination. Thereafter, by way of relief the arbitrator ordered the management to pay Kullappan the arrears of back wages till 20th November, 1962, besides retrenchment compensation on the basis of his services upto 20th November, 1962.

In the case of Narasimhan, Sreerangan and Usman, the points referred to the arbitrator for decision were : (1) whether their non-employment as conductor with effect from certain specified dates was justified, and (2) to what relief they were entitled ? In the case of both Narasimhan and Sreerangan the management had dismissed them for misappropriation of small amounts out of ticket collections from passengers. But the arbitrator found that the offence in their cases was purely technical. The shortages had occurred in many similar instances in the past, but the rule about strict accounting had not been enforced in such cases by the management and that consequently the arbitrator held that in spite of the finding that the workers concerned had committed the offence from a technical point of view, the management ought to have let them off with fines or loss of wages and should not have terminated their employment. In the case of Narasimhan the arbitrator, while upholding the order of termination of employment, directed the management to pay him retrenchment compensation together with six months' consolidated pay as additional compensation. In the case of Sreerangan, after coming to a similar conclusion about the technical nature of the offence, the arbitrator gave him relief by way of retrenchment compensation but not additional cash compensation. In the case of Usman, the charge was that he had overloaded the bus on a certain day. The arbitrator observed that the charge was proved in his case but the nature of the offence justified the award of a light punishment and though in such circumstances he would have ordered the worker's reinstatement he was awarding, instead, retrenchment compensation as well as six months' consolidated wages, by way of cash compensation.

The argument pressed before me by the learned Counsel appearing for the management, who is the petitioner in this writ petition, is that in the case of Kullappan the data afforded by the correspondence, that passed between him and the management prior to November, 1962, would show that his appointment had come to an end long previously and that what he was seeking from the management was really an order of fresh appointment. But the arbitrator came to a different conclusion on the data that Kullappan's appointment was not really terminated till November, 1962. This is a question of fact on which the arbitrator is entitled to come to his own conclusion and it cannot be corrected in writ proceedings. As the learned Counsel for the first respondent points out, in Kullappan's case the relief awarded by the arbitrator is really for the back wages prior to the termination of

his services as well as retrenchment compensation, and that cannot be considered to be beyond the scope of the dispute regarding the entitlement of relief, which was also referred to the arbitrator for decision. At the same time, learned Counsel for the petitioner also urged that the arbitrator, after finding that the termination of the services of the worker by the management was justified, acted without jurisdiction in any event, in awarding retrenchment compensation. I will consider this point along with a similar point urged in the case of the other three employees, regarding the nature of relief awarded by the arbitrator.

Learned Counsel for the petitioner referred to a series of decisions dealing with awards of Labour Tribunals and Labour Courts which held that where the Labour Court or Tribunal found that the order of dismissal of a worker by the management is justified, it had no jurisdiction thereafter to award relief by way of compensation and that the question of awarding such relief will only arise in cases where there is a previous finding that the dismissal of the worker was not justified. *Pudukottah Textiles Ltd* v. *A. Subramaniam*[1], and *Management, H.T.E* v. *Presiding Officer, Labour Court*[2], were some of the decisions cited in this connection. It was urged in the case of Sreerangan and Narasimhan that in view of the finding that they have misappropriated collections, the arbitrator should not have directed the management to pay them amounts by way of cash compensation or consolidated wages as the case may be. After upholding the order of termination of service in the case in Usman likewise, the order for payment of compensation equal to six months' consolidated wages was based on the finding not that the dismissal of Usman was improper, but that the punishment meted out to him was too severe and that in giving such a direction the arbitrator acted without jurisdiction.

Before considering these points, I will advert to one preliminary objection raised by the learned Counsel for the first respondent that the reference in the present case being one under section 10-A of the Act, based on the voluntary submission of the management and the workers to abide by the arbitrator's award, the arbitrator thereafter functions only as a non-statutory body, and his decision cannot be made the subject-matter of a writ proceeding under Article 226 of the Constitution. Reference was made to the judgment of Srinivasan, J., in *Anglo-American Tea Trading Co.* v. *Its Workmen*[3], where the learned Judge followed an earlier decision of the Kerala High Court in *A.T.K.M. Employees' Association* v. *Musaliar Industries*[4] and came to the conclusion that the award of an arbitrator, in similar cases, cannot be made the subject-matter of proceedings for the issue of a writ of *certiorari* or *mandamus* Having expressed his opinion in this manner, the learned Judge, nevertheless, went into the merits of the contentions urged before him and gave a decision. *Per contra*, learned Counsel for the petitioner referred to the decision of the Punjab High Court in *Rohtak-Delhi Transport* v. *Risal Singh*[5], where a Bench of that Court has given a contrary opinion. In that decision it is laid down that the decisions of the arbitrator in a reference under section 10-A of the Industrial Disputes Act are quasi-judicial decisions and that the award of the arbitrator should *ex facie* show the reasons on which it is based and if the arbitrator has exercised uncontrolled or arbitrary power to make the award completely bare of reasons, the High Court can interfere under Article 226 of the Constitution Between these two views, there seems to be an intermediate view laid down by the Supreme Court in *Engineering Mazdoor Sabha* v *Hind Cycles*[6] There the Supreme Court was dealing with the question whether an arbitrator appointed under section 10-A of the Industrial Disputes Act would be a Tribunal within the meaning of Article 136 of the Constitution, with a right of appeal to the Supreme Court against the award The Supreme Court came to the conclusion that he is not such a Tribunal and that no appeal under Article 136 of the Constitution would lie, but at the same time, it recognised (i) that the decisions of an arbitrator under section 10-A of

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1 (1957) 2 M.L.J. 438 : A.I.R. 1958 Mad 139
2 A.I.R 1962 Assam 105.
3. (1963) 2 L.L.J. 752.
4 (1961) 1 L.L.J 81
5. A.I.R. 1963 Pun. 472 (1964) 1 S.C.J. 140.
6. (1962) 2 L.L.J 760

the Industrial Disputes Act are quasi-judicial decisions and (2) from the circumstance that the arbitrator appointed under section 10-A is clothed with certain powers, his procedure is regulated by certain rules and the award pronounced by him is given statutory and binding character for a specified period, it may perhaps be possible to describe him, in a loose sense, as a statutory arbitrator. In view of the above statement of the Supreme Court and also bearing in mind the decision of the Punjab High Court it seems to me to be safer in such cases not to reject outright a plea that the award of an arbitrator appointed under section 10-A of the Act is outside the scope of the writ jurisdiction of this Court under Article 226 of the Constitution As long as the power that he exercises is recognised as a quasi-judicial power and his decisions have got the validity of affecting the rights *inter se* between the workers and the management the discretion of this Court to interfere in proper cases under Article 226 of the Constitution must be recognised.

However, the arguments for the petitioner in the present case, involved the basic assumption that the second point referred to the arbitrator for decision, namely, the nature of the relief, would follow strictly from a decision on the first point as to whether the dismissal of the worker concerned was justified or not. The argument proceeds on the assumption that if the arbitrator gives an award upholding the decision of the management under the first point with or without any qualifications he should also uphold the decision of the management in the matter of depriving the workman of all relief whether on the short ground that the discretion as to punishment lies with the management and the arbitrator can interfere only where that discretion has been used in such a harsh and oppressive manner as to lead to an inference of *mala fides*. But in the present case, I am of the opinion that the reference being a voluntary one by the parties of their own accord, the arbitrator had a wider freedom in adjudicating upon both the points referred to him for decision, and this freedom would include an adjudication upon the merits of the punishment awarded and whether it cannot be mitigated by suitable relief. It may not be proper, while dealing with an award of an arbitrator under section 10-A of the Act, on a voluntary reference to arbitration, to whittle down his discretion in the matter of assessing the quantum of punishment in the same way as in the case of an award by a Labour Court or a Tribunal. Examined from this point of view, it appears to me that in the present case the arbitrator took into account not merely the actual factum of termination of the services of the workman concerned, but also the circumstances surrounding it, for the purpose of moulding the relief to be granted to the workman under the second point referred to his decision. In each case the arbitrator has given reasons for tempering the punishment with mercy, bearing in mind the entire background of the case. I am not prepared to say that the discretion exercised in this manner, together with the reasons given therefor is fit for being corrected in these writ proceedings, which are dismissed. There will be no order as to costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE K. SRINIVASAN.

The Cosmopolitan Club, Madras, represented by its Honorary Secretary, D. Kesava Reddy .. *Petitioner**

v.

The District Employment Officer, Madras-14 .. *Respondent.*

Employment Exchanges (Compulsory Notification of Vacancies) Act (XXXI of 1959)—*Applicability—Scope and object of.*

Words and Phrases—'Business'—Meaning of.

Interpretation of Statutes—Definition clause—Wider interpretation to achieve the object of the legislation.

Reading the definitions of 'employer', 'employee' and 'establishment' and the provisions of section 4 of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 together with the statement of objects and reasons, it is clear that the Act was brought on the statute book only for the purpose of enabling the appropriate authorities to assess the employment potential in various categories of employment The Act is intended to serve a statistical need to assess future policy in connection with imparting of training to potential employees.

The expression "business" need not invariably be associated only with the carrying of an activity which includes a profit motive.

Though a statute may define certain expressions in a particular manner, the interpretation of those expressions cannot be unrelated to the purpose underlying the enactment Where the object and scope of the statute requires it, there should be no difficulty in holding that the relevant expressions used therein should have a wider import.

Having regard to the object of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 the expressions 'employer', 'employee' and 'establishment' defined in the Act must be understood in their widest sense and the presence or absence of a profit motive in the carrying on of a business is wholly immaterial in construing the relevant expressions. A club run for the benefit of its members will also be within the scope of the provisions of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the records from the District Employment Officer, Madras-14, in the matter of the notice issued by him dated 23rd May, 1963, and quash the same and issue a writ of prohibition restraining the respondent herein from proceeding further in pursuance of the said notice.

T.A. Ramaswami Reddy, for Petitioner.

Habibulla Badsha, for the Government Pleader, for Respondent.

The Court made the following

ORDER.—The Cosmopolitan Club, Madras, is the petitioner. The respondent, the District Employment Officer, wrote to the petitioner club on 23rd March, 1963, a letter drawing attention to an earlier letter dated 22nd December, 1962, wherein the respondent had requested the club to furnish information concerning the employment in the petitioner's establishment. This letter led to the filing of the present writ petition seeking the issue of a writ of *certiorari* or other appropriate writ to quash the proceedings taken by the District Employment Officer. The petitioner states in its affidavit that the club is a members' club not run with any profit motive, that it is not in the nature of a commercial undertaking and that the communication of the District Employment Officer asking the club to furnish particulars is based on a misconstruction of what an establishment means within the meaning of the Employment Exchanges (Compulsory Notification of Vacancies) Act of 1959. It is the contention of the petitioner that not only is the petitioner club not an establishment within the meaning of the Act but also that no industry, trade, business or occupation is carried on in the premises. It is urged that the respondent has no jurisdiction to call upon the club to furnish the information sought.

The respondent in his counter-affidavit claims that the abovementioned act was enacted for the purpose of undertaking measures for the training and em-

*W.P. No. 459 of 1963. 16th December, 1966.

ployment of persons on information gathered to indicate the employment trends in the market. In order that vocational training might be given to make employees suitable for the demands of the employers, the Act makes it compulsory upon employers to report all vacancies except in certain categories It is claimed that the Act applies to all establishments in the private sector, where ordinarily 25 or more persons are employed for remuneration. It is claimed also that having regard to the object of the Act, the expressions 'industry', 'business', 'trade' and 'occupation' need not involve any connotation of a profit motive. It is urged therefore that the District Employment Officer is within his powers in calling upon the petitioner to furnish the required information.

Mr. T.A. Ramaswami Reddiar, learned Counsel for the petitioner club, in the course of his arguments contends that in the light of decisions which have dealt with organisations like the petitioner club for the purpose of analogous enactments, it should be held that the petitioner club would not come within the scope of an establishment as defined in this Act. That is the short contention which requires to be examined.

The Employment Exchanges (Compulsory Notification of Vacancies) Act makes it compulsory upon the employer in every establishment in the private sector to notify any vacancy arising in the establishment to such Employment Exchanges as may be prescribed. Section 4 of the Act makes it compulsory for every establishment in the public sector to do so on and after the commencement of this Act But, in the case of an establishment in the private sector, the appropriate Government issues a notification under section 4 (2) of the Act making the provisions applicable thereto. It is not in dispute that such a notification was issued in 1960. Turning to the definitions contained in the Act, the word 'employee' and 'employer' are defined in relation to an "establishment", the one as employed to do any work for remuneration and the other as one who employs one or more persons to do work for remuneration. 'Establishment' is defined to mean any office or any place where any industry, trade, business or occupation is carried on. Nextly, the expressions "establishment in the public sector" and 'establishment in the private sector' are defined the latter being defined to mean an establishment which is not an establishment in the public sector and where ordinarily 25 or more persons are employed to work for remuneration. While section 4, by sub-sections (1) and (2), makes it obligatory upon establishments in the public sector and in the private sector respectively to notify vacancies, section 3 makes the Act inapplicable in relation to certain types of vacancies, so that in the case of even establishments which are compelled to notify vacancies, certain specified vacancies need not be notified. An important provision is section 4, sub-section (4), which states that notwithstanding the obligation to report the vacancies, it does not impose the further obligation upon the employer to recruit any person through the Employment Exchange to fill the vacancy reported. Broadly stated, therefore, this Act confers no authority upon the Employment Exchanges to insist that any person indicated by them should be employed for the purpose of filling the vacancy reported by an establishment. Reading these provisions in the Act along with the Statement of Objects and Reasons, it appears to be abundantly clear that the Act was brought on the statute book only for the purpose of enabling the appropriate authorities to assess the employment potential in various categories of employment The Act was clearly intended to serve a statistical need to assess any future policy in connection with the imparting of training to potential employees.

As I stated, the principal argument of Mr. Ramaswami Reddi is that the petitioner club is not an establishment, for according to him it is not a place where any industry, trade, business or occupation is carried on. He has referred to *The Cosmopolitan Club* v. *Joint Commercial Tax Officer*[1]. In that case, the question arose whether the sales effected by the club to its own members, such sales being of refreshments, would come within the scope of the General Sales Tax Act and would attract tax thereunder. That decision was more concerned with interpreting the

1. (1963) 2 M L.J. 480.

expressions 'sale' and 'dealer' which occur in that enactment, for that Act purports to bring to tax only the turnover of a dealer carrying on the business of sales of goods The real basis of that decision was that in supplying and distributing refreshments to its members against payment there was no transfer of property by the club as an absolute owner to its members as purchasers. Whether or not a profit margin existed was not regarded as material. When once there was no sale, which according to the definition meant a transfer of property in goods, the liability to tax did not arise. The question whether a business must always be associated with a profit motive did not expressly come up for consideration in that decision.

In *The Y.M.I A.* v. *The Assistant Inspector of Labour*[1], the question was whether this association could be brought within the scope of the expression of 'catering establishment' in the Catering Establishments Act In that Act, the expression 'catering establishment' was defined to mean a "restaurant" or a "residential hotel" and in defining these two latter expressions, the relevant part dealt with 'any premises' in which the business of providing accommodation and supply of meals or of supply of refreshments to the public or a class of the public was carried on. In view of the inter-related nature of these definitions, the learned Judges went on to hold that the expression 'business' involved as an essential element thereof the profit motive.

Mr. Ramaswami Reddi also referred to Wharton's Law Lexicon and other dictionaries to emphasise his point that business is an activity connected with the operation of trade as a productive pursuit and that a profit element is invariably linked with business. It is his contention that since the Cosmopolitan Club caters to its own members and no one else the profit motive is altogether absent and that therefore the activity carried on by the club is not business.

I am unable to agree that the word 'business' should be invariably associated with the carrying of an activity which includes a profit motive. The first point to notice is that though a statute may define certain expressions in a particular manner, the interpretation of those expressions cannot be unrelated to the purpose underlying the enactment. That principle has been laid down in *State of Bombay* v. *Hospital Mazdoor Sabha*[2], where the definition of the word 'industry' in the Industrial Disputes Act was examined. The definition of that expression in that Act included any business, trade, undertaking, etc. Their Lordships pointed out that the definition had deliberately used words of very wide import. They referred to the rule of interpretation that where there are two or more words which are susceptible of analogous meanings, they are to be understood as used in their cognate sense They observed that that principle is only a rule of construction and cannot prevail where the statute has deliberately used words to make the scope of the defined word much wider and they clearly say that,

> "if the object and scope of the statute are considered, there would be no difficulty in holding that the relevant words of wide import have been deliberately used by the Legislature in defining industry ... ."

and they proceeded to refer to various definitions and the object of the Act as well

On behalf of the respondent the decision of a single Judge of the Calcutta High Court *The Bengal Club* v. *Santi Ranjan*[3], has been relied upon. In that case, the learned Judge held that a club run for the benefit of its members carries on an industry within the meaning of the Industrial Disputes Act.

In my view, taking into consideration the object of the enactment, the definitions used in the Act must be understood in their widest sense, and if that should be done, the presence or absence of a profit motive in the carrying on of a business is wholly immaterial in construing the relevant expression I am satisfied that the contention of the petitioner that the Act does not apply to it cannot be maintained. The petition is accordingly dismissed. No costs.

R. M. ——— *Petition dismissed.*

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1 (1964) 2 M L J 177
2 (1960) S.C J 679 : A.I R 1960 S.C 610.
3. A I.R. 1956 Cal. 545.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR JUSTICE P. S KAILASAM.

M. Natarajan .. *Petitioner**

v.

The Madras State Electricity Board, represented by the Superintending Engineer, Mettur Electricity System, Mettur Dam .. *Respondent.*

Madras State Electricity Board Standing Orders—Rule 31—Scope of

Master and servant—Departmental Enquiry—Prejudging issue—Test of.

Rule 31 of the Madras State Electricity Board Standing Orders specifically provides that no workman shall be demoted to any post or grade lower than to which he was initially recruited under the Board Hence the Board has no jurisdiction to punish a driver by demoting him to the post of a cleaner.

Where an enquiring authority rejects the explanation given by the workman against whom charges have been framed, as false and calls for an explanation from the workman why he should not be punished for giving a false statement, it would give a reasonable apprehension in the mind of the workman that his case has been prejudged

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the respondent, the Superintending Engineer, Mettur Electricity System, Mettur Dam, in his order in Memo. No ADM. 1/C4/1734/66, dated 8th July, 1966 (Exhibit 'A') and quash the order therein.

N. G. R Prasad for *Row* and *Reddy* and *M. P. Subbayya,* for Petitioner.

C. Ramakrishna for *G. Ramanujam* and *M. S. Umapathy,* for Respondent.

The Court made the following

ORDER —This petition is filed for the issue of a writ of *certiorari* calling for the records of the Madras State Electricity Board represented by the Superintending Engineer, Mettur Electricity System, and to quash his order made in Memo. No. ADM 1/84/1734/66, dated 8th July, 1966, reverting the petitioner as Cleaner II grade from the post of lorry Driver, II grade.

The petitioner joined the Electricity Department of the Government of Madras in September, 1949 as Mechanic. When the State Electricity Board took over the electric supply the petitioner's services were transferred to the Board. At that time he was a lineman driver In 1964 certain charges were framed against the petitioner. On 10th April, 1964, a Memo , was given to the petitioner charging him that he failed to deliver a letter which was intended to a superior Officer The petitioner was also charged that he failed to follow instructions before taking a vehicle from Mettur Dam to Salem The petitioner offered an explanation and the first charge-sheet was given to petitioner on 11th June, 1964. In this charge-sheet in addition to the two charges mentioned in his Memo , dated 10th April, 1964, namely, non-delivery of a letter to an officer and failure to take instructions before taking a vehicle, a third charge was added, namely, that the explanation he submitted was false The third charge related to the giving of the false statement in explaining the two charges given to him under the Memo. dated 10th April, 1964 The second charge-sheet was given to the petitioner on 26th March, 1965, which related to making a false claim for travelling allowance for three days in October, 1964 Subsequently, another Memo was issued on 29th March, 1965, charging the petitioner with taking a non-departmental man in van The petitioner submitted his explanation on 6th April, 1965, and a charge-sheet was given to the petitioner in which, in addition to the charge mentioned in the Memo that he misused the van, the charge that he suppressed the facts of the case in his explanation

* W.P. No 2172 of 1966. 4th January, 1967

was also framed. A fourth Memo. was given on 21st April, 1965, alleging that the petitioner failed to maintain the van properly The petitioner submitted an explanation and the fourth charge-sheet was served on the petitioner on 22nd July, 1965, in which, in addition to the charge that he failed to maintain the van properly, a charge that he suppressed full facts was also framed against him. An enquiry was conducted and a provisional show cause notice was issued to the petitioner on 6th April, 1966 and on 8th July, 1966, the impugned order reverting the petitioner to the post of cleaner was passed.

In this writ petition learned Counsel for the petitioner submitted that the order is not maintainable on the ground that the reduction of the petitioner as cleaner is contrary to rule 31 of the Madras State Electricity Board Standing Orders which provides that " no workmen shall be demoted to any post or grade lower than to which he was initially recruited under the Board ". Secondly, it was contended that the enquiring officer was prejudiced as after receiving the explanation to the three Memos. an additional charge for suppressing the facts was framed against him. It was submitted that the enquiring officer in rejecting the explanation and framing a charge on the basis that the explanation is false has prejudged the issue and therefore even the charges relating to the other matters are not sustainable.

Regarding the objection that the punishment of reduction contravened rule 31 of the Standing Orders of the Madras State Electricity Board, the rule specifically provides that no workman shall be demoted to any post or grade lower than to which he was initially recruited under the Board It is not disputed that the petitioner when he was recruited was a lineman driver and by this order he has been demoted to a post lower than to which he was initially recruited. This punishment cannot be sustained, and has to be set aside.

Regarding the contention that the enquiry authority was in error in framing a charge on the basis that the explanation given by the petitioner is false, the contention of the petitioner will have to be upheld. It is unnecessary to deal with the other charges But the fact that the explanation given by the petitioner on various charges were not only rejected but were also stated to be false and the petitioner asked to explain why he should not be punished for giving a false statement, would give a reasonable apprehension in the mind of the petitioner that his case has been prejudged. In the circumstances, the proceedings cannot be sustained. But the authorities will be at liberty to frame fresh charges against the petitioner and proceed with the enquiry and in the event of the charges being proved, to award any punishment that is provided in law. The order of reduction is set aside. There will be an order accordingly. No order as to costs.

R.M. ——— *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE T. RAMAPRASADA RAO

In the matter of the Indian Companies Act

In the matter of Cuddalore Construction Co , Ltd (in liquidation).

T.V. Somasundaram Pillai ... *Applicant**

v.

The Official Liquidator, High Court, Madras ... *Respondent.*

Companies Act (VII of 1913), sections 38, 184, 186 and 190—Rectification, Application for—Applicant aware of his name entered in the Register even in 1950—Company ordered to be wound up—List of contributories settled—Decree (balance order) passed against him in 1960—Application subsequent—Acquiescence and laches—Effect of—Power of Court, exercise of.

After due compliance with the requirements of sections 184 and 186 of the Companies Act, 1913 and rules 96 to 98 of the Companies (Madras) Rules, 1940, the Official Liquidator of the Cuddalore Construction Co , Ltd , (in liquidation) obtained a decree against the applicant, as a contributory for payment of Rs 910, etc Notice of intended execution of the same was sent to him on 23rd April,

*Comp. Applns. Nos. 284 of 1965 and 178 of 1966. 3rd March, 1967.

1965 Then he applied (1) for setting aside the decree, and (2) for rectification of the Register and the list of contributories

Held, the decree has become conclusive in law (*see* section 190 of the Act.)

If the applicant is not entitled to the rectification prayed for, his application to set aside the decree fails automatically

'Rectification' of the Register has a special significance of its own, it implies that there is a prior mistake, error or defect which after rectification is made good and corrected by removing such mistake or error The power of Court to order rectification has to be exercised with great caution

It is clear from the judgment in C C C A No 95 of 1952 that the applicant knew even in 1950 that his name was entered in the Register of members He has been guilty of laches in not having it rectified with alacrity and promptitude as he was bound to

Once a 'balance order' is passed by the High Court against a contributory the remedy of rectification is not available to him A member cannot stand by and acquiesce in his name remaining in the Register and wake up at a late stage and particularly after the winding up order is made He is guilty of holding out that he is a member Rectification has to be refused in such a case even if a proper case for rectification is made out.

Applications for setting aside *ex parte* decree dated 22nd April, 1960, in Company Application No. 78 of 1960 and for rectification by deleting applicant's name from the Register and from the list of contributories of the company.

N C. Raghavachari, N S Varadachari, for Applicant

Respondent in person.

The Court made the following

ORDER —Company Application No 289 of 1965 is an application for setting aside the *ex parte* decree, dated 22nd April, 1960, made in Company Application No 78 of 1960 in O P No 374 of 1953 and Company Application No 178 of 1966 is an application for rectification of the register of members of Cuddalore Construction Co., Ltd , in Liquidation, and also for the deletion of the applicant as a contributory of the company.

The relevant facts are as follow. After due compliance with the requirements of sections 184 and 186 of the Companies Act, 1913, with which we are concerned in this case, and rules 96, 97 and 98 of the Indian Company Rules (Madras), 1940, the Official Liquidator obtained a decree on 22nd April, 1960, whereby the applicant as a contributory, was directed to pay a sum of Rs 910 with interest thereon at 6 per cent per annum from 3rd March, 1959 In fact, even at the stage when the list of contributories was sought to be settled, notices as required under law were attempted to be served on the applicant At one time, the notice was returned with the endorsement " no such addressee " When the Official Liquidator made a call for the payment of the unpaid call money after obtaining orders of Court in Application No. 280 of 1958, a second notice was sought to be served on the applicant, which again was returned with the postal endorsement "Left without instructions." Subsequently, in Application No 78 of 1960, the Official Liquidator applied for a payment order against the applicant since he had failed to pay the call amount. This notice was again sought to be served in the usual manner. The ordinary service on the applicant having failed, substituted service by publication in "the Mail" was ordered. Another copy of the notice was also affixed on the Court notice board After adopting such processes, this Court, by its order dated 22nd April, 1960, directed the applicant to pay a sum of Rs 910 with interest thereon at 6 per cent per annum from 3rd March, 1959, till date of payment. This order is conclusive under section 190 of the Act, of the fact, that such monies is due by the applicant

On obtaining such a decree, the Official Liquidator was anxious to secure the amount from the applicant He even attempted to personally contact the applicant, which he did on 9th March, 1965 On 10th March, 1965, the applicant came to the office of the Official Liquidator, perused the records and promised to settle the matter. He having failed to keep up his undertaking, a final notice was sent by the Official Liquidator on 23rd April, 1965, intimating the applicant that execution proceedings would be taken in case of further default in the payment of the decree amount.

Thereafter, and for the first time, by his letter dated 27th July, 1965, the applicant denied liability on the basis of certain Court proceedings, and prayed that his name may be removed from the list of contributories. The Official Liquidator explained the correct position in his letter dated 2nd August, 1965, and granted him some more time to pay the amount. A reminder was also sent on 12th October, 1965. It is at this stage that both the applications referred to above have been filed. The allegation of the applicant is that he became aware of the passing of the decree only on 2nd August, 1965, and that the shares which stood in his name were only shares nominally recorded therein by one of the directors of the company who owed him money and that therefore there was no relationship of a member to a company subsisting at any time and the applicant, therefore, requests in both the applications to set aside the decree passed against him on the foot that he was a contributory and to rectify the register by removing his name as a member.

The present contention of the applicant that he became aware of the decree only on 2nd August, 1965, cannot stand scrutiny at all for the reason that he knew about it even on 10th March, 1965, when he inspected the records and promised to settle the matter. Whether a contributory against whom a balance order, as is commonly known, has been passed, can seek to set aside a decree which has become final in the eye of law depends upon the main question whether the application for rectification of the register prayed for by the applicant by removing his name as a member thereto is plausible and possible in the circumstances. If the applicant is not entitled to the relief for rectification of the register, then his application for setting aside the decree dated 22nd April, 1960, has to fail automatically, since it has become conclusive in the eye of law and there are no grounds or sufficient cause shown in the affidavit in support thereof to set aside the same.

The expression 'rectification' of a company's register is a purposeful expression. It has a special signification of its own. The word implies that there is a prior error, mistake or defect which is apparent on the face of the record of the register, which after rectification, is made good and corrected by removing such a mistake or error. As was pointed out in *Pulbrook* v. *Richmond Consolidated Mining Co.*[1]

"The effect of rectification is exactly the same as if the name struck off had never been put in. That is the meaning of 'rectification'."

Unless the applicant establishes a just cause or an equity in him to strike off his name in the register, the Company Court would not exercise its discretion to rectify the register. As was pointed out in *Beherby* v. *Rowland and Marwood's Steamship Co., Ltd.*[2]:

"In considering an application for rectification, the Court has always had regard to the lapse of time, and to any facts and circumstances indicating acquiescence in the existing state of things by whom or on whose behalf the application is made to disturb it."

The power, to correct a register of Court has to be exercised with caution. It has to be remembered that in such a summary adjudication, a roving enquiry is not contemplated. The applicant is seeking in the main to rest his contention on certain proceedings in Court, and particularly the judgment of this Court in C.C.C.A. No. 95 of 1952. That was a case in which there were certain disputes between the applicant and a director of the South Arcot Oil and Refineries Limited. The case of the applicant was that the director of the above company borrowed certain moneys from the applicant and as security thereto, the said director gave out that he would secure shares nominally in the name of the applicant in the South Arcot Oil and Refineries Limited and also in the Cuddalore Construction Company Limited which is now in liquidation and whose register is sought to be amended in the first petition. It is clear from the judgment of Govinda Menon and Ramaswami, JJ., that the applicant knew at all material times, ever since he started the suit in 1950, that his name was in the register of members in the Cuddalore Construction Co., Ltd., now in liquidation. In fact, the applicant is reported to have signed certain transfer forms for transfer of the shares by the applicant in favour of the director abovenamed. The learned Judges, after considering the probabilities of the case, came to the conclusion

1. (1878) 48 L.J.Ch. 65 : 27 W.R. 377 : L.R. 9 Ch. D. 610.

2. 71 L.J. Ch. 541 : 86 L.T. 671 : 50 W.R. 566 : L.R. (1902) 2 Ch. 14.

that the applicant's version that he lent money as a debt pure and simple was more reliable and probable But this observation of the learned Judges in the said judgment cannot relieve the statutory responsibility which at all times vested with the applicant to correct the register of members in the company under consideration with alacrity and promptitude It might be that the applicant might have taken the precaution of claiming damages against the director for having improperly included his name in the register of members and ought to have also taken the precaution of claiming the damages that might reasonably and naturally flow from the fact that the name of the applicant indisputably appeared in the register of members This has not been done The applicant cannot take advantage of his own laches and avoid a claim *in legi* and which is undoubtedly not a claim *in contractu* Once a balance order is passed by Court against a contributory on the foot that his name appeared in the register of members, and that his liability as a contributory has become indubitable, then a remedy to rectify the register on the ground that his name was incorrectly remaining in the register of members is not available to such a person A claim to rectify the register cannot be asked for *ex debito justitiae* It must be based on certain accepted principles, particular care being taken to find whether the applicant who is seeking such a discretionary and equitable relief is guilty or not guilty of laches.

This doctrine of laches has a very great significance as a member in any event should repudiate the contract in unequivocal terms and without undue delay, as otherwise such delay would be fatal to his application for rectification If the name of a person appears in the register of members, he can't at his whims and fancies ask for recision of such a contract to take shares as it would be lost because of inaction or lack of prompt action on his part. This rests on the wholesome and salient principle that such a person has allowed the company to obtain credit on the strength of it and in case the company goes into liquidation the rights of creditors are deemed to have been crystallised on such a date A member therefore cannot standby and acquiesce in his name remaining in the register of members and wake up at a late stage and particularly after the winding up of the company and ask for rectification Lord Romillay, M R, in *Walker's case, In re Anglo-Danubian Steam Navigation and Colliery Co*,[1] observed at page 35 :

" .....Where there has been no fault on either side the register remains as it was — where the fault is on both sides the register also remains as it was "

Therefore, the onus is heavily on the shareholder to set right the mistake, if any, in the register without any delay The above decision has been quoted with approval by a Division Bench of the Bombay High Court in *Mohamed Akbar* v. *Official Liquidator*[2] A Division Bench of this Court also, in *Lakshmi Narasa Reddi* v *Official Receiver, Sree Films Ltd*[3], observed that where a person allows his name to remain on the register, without having it removed promptly he will be liable on the doctrine of holding out

The position becomes more complicated if the company is wound up The House of Lords categorically is of the view in *Oakes* v *Turquand and Harding*[4], that unless a member has taken steps to get his name removed from the register or taken some other unequivocal action before liquidation, he will be too late In fact, in *Bank of Hindustan* v *Suryanarayana Rao*[5], a Bench of this Court held :

" A petition for rectification will lie normally after the filing of a winding up petition and before the winding up order is passed, provided that the Court will normally reject the petition if the company is already in a notorious state of bankruptcy by the time the petition for rectification is filed "

Where the winding up order had intervened whereby the rights of creditors were made paramount, application for rectification must be refused even if a proper case for such

1. (1868) 6 Eq 30
2. 52 Bom L R 40 A I R 1950 Bom 217
3. (1951) 1 M L J 488 I L R (1952) Mad. 108 A I R 1951 Mad. 890.
4. (1867) L R 2 H L. 325 : 36 L.J Ch. 949 : 16 L T. 808 15 W R 1201.
5. (1957) 2 M L J 517 : I L R. (1957) Mad 1058 . A I R. 1957 Mad. 702.

rectification on the ground of repudiation of the shares is made out. In fact, it is accepted law that it would be too late for a shareholder to repudiate the share after winding up even if a proper case for repudiation had been made earlier The essential principle to be remembered is that after winding up, the rights of creditors are crystallised, and the hope held out to the creditors ought not to be dislodged at that time by rectifying the register on an application by a member who contends that his name is wrongly remaining on the register Having held out that he is a shareholder and thereby a contributory also, if he fails to pay the share amount, he cannot approbate and reprobate and ask for an equitable discretionary remedy from Court to rectify the register.

In this case the member knew that his name was in the register ; he also knew that a balance order was passed—he also knew that a balance order was passed against him as early as 10th March, 1965 The delay in filing this application has not at all been explained The decision in C C C A. No 95 of 1952 cannot help the applicant in any manner whatsoever. He cannot, therefore, at this belated stage set at naught the rights which have become vested and crystallised in the creditors The balance order passed against him on 22nd April, 1960 is final, conclusive and binding on him No substantial ground has been made out before me to set aside the decree dated 22nd April, 1960, and much less there is any substance in the contentions raised at this stage for the rectification of the register. Both the applications are therefore dismissed But in the peculiar circumstances of this case, there will be no order as to costs.

K.G.S *Petitions dismissed.*

[END OF VOLUME (1967) 1 M L J. (REPORTS)]